TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted]288

CONSOLIDATED GAS COMPANY OF NEW YORK, APPELLANT,

vs.

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 7, 1921.

(28,213)

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1 Recd. & Ent. Feb. 16, 1921. Per A. W. P.

Notice of Motion.

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, et al., Defendants.

SIRS:

Please take notice that, pursuant to the permission of the court, the undersigned will move this court at the chambers of Hon. Judge Learned Hand, No. 233 Broadway, New York City, on February 17th, 1921, at 2 o'clock p. m., for an order amending, changing and modifying the decree heretofore made and entered by this court in this cause on August 11th, 1920, so that paragraphs "(6)," "(7)" and "(9)" of said decree now reading as follows:

"(6). Further ordered, adjudged and decreed as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One Dollar and twenty cents per thousand cubic feet."

"(7). Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until March
2 first, 1921, or until the earlier promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the city of New York, all sums in excess of eighty cents."

"(9). Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowances when fixed by the court."

shall read as follows:

"(6). Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until the promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One dollar and twenty cents per thousand cubic feet."

"(7). Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until the promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents."

"(9). Further, ordered, adjudged and decreed that the said special master shall hold said moneys until the promulgation of such rate, as aforesaid, and upon the promulgation of such rate the
3 said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; the said special master to retain therefrom his expenses and allowances when fixed by the court."

and for such other and further relief as to the court may seem just and proper under the circumstances.

Dated, February 15, 1921.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.

Office & P. O. Address, Capitol, Albany, N. Y.

TERENCE FARLEY,
Solicitor for Defendant Barrett.

Office & P. O. Address, #49 Lafayette Street, New York City.

JOHN P. O'BRIEN,
Corporation Counsel and Solicitor for Defendant Swann.
Office & P. O. Address, Municipal Building, New York City.

To Shearman & Sterling, Solicitors for complainant, Office & P. O. Address, 55 Wall Street, New York City.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Mar. 2, 1921.

4 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Before Learned Hand, D. J.

Affidavits in Opposition to the Defendants' Motion for Modification of the Decree of August 11, 1920 (*Including Supplemental Affidavits*).

Filed Feb. 28, 1921.

Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.
William L. Ransom, Charles A. Vilas, Jacob H. Goetz, of Counsel.

5 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Before Learned Hand, D. J.

Affidavits in Opposition to the Defendants' Motion for Modification of the Decree of August 11, 1920.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County and City of New York, ss:

Robert A. Carter, being duly sworn, deposes and says:

6 I.

I am a Vice-President of the Consolidated Gas Company of New York, and have been connected with that company in several capacities since its formation in 1884 by the consolidation of several gas companies theretofore operating in the City of New York. I am Comptroller of the Astoria Light, Heat and Power Company, Treasurer and a Director of the New York and Queens Gas Com-

pany, a Director of the Central Union Gas Company and of the Northern Union Gas Company, and a member of the auditing committee of The Standard Gas Light Company of the City of New York.

For many years I have had charge and direction of the accounts and accounting system of the Consolidated Gas Company, and custody of its books and records. In earlier years I personally kept the books of account; in more recent years I have supervised the work of others upon them. I have also under my immediate charge the commercial, appliance and utilization departments of the Company. I have had a great deal to do with the arrangements for the financing of the operations of the Consolidated Gas Company for many years, and likewise with arrangements between the Consolidated Gas Company and its affiliated gas companies for the harmonious and mutually advantageous operation of their respective properties in serving the public economically and efficiently, and with the financing of the operations of these various companies.

I have kept myself continuously informed as to, and am familiar
7 with, the details of the operations of the properties, revenues and expenses, and the financing, not only of the Consolidated Gas Company, but also, for at least twenty years past, of the other companies mentioned. I testified as to many of these matters as a witness upon the trial of this case. I am also familiar with the detailed facts as to operating costs, revenues and expenses, and the like, as disclosed in the annual reports of the Consolidated Gas Company and of each of its affiliated gas companies to the defendant Public Service Commission for the First District, pursuant to the Orders of the defendant Commission.

II.

This affidavit is submitted by me, in behalf of the complainant gas company, in opposition to the application made by the defendants, as set forth in their notice of motion dated February 15, 1921, for an Order of this Court, changing and modifying the decree heretofore made and entered by this Court in this cause on August 11, 1920, so as to continue indefinitely to limit to the rate of $1.20 per thousand cubic feet, the charge which the Consolidated Gas Company may make for gas supplied to its private consumers, to require the Consolidated Gas Company to continue to impound the excess collected by it above 80 cents per thousand cubic feet of gas, and to extend indefinitely from March 1st, 1921, the period of time within which a rate fixed by the Legislature or other competent public authority acting under a delegation of legislative power may be made to operate retroactively as to the complainant.

8 ## III.

Attitude of the Complainant Company.

The complainant company protests with all possible earnestness and emphasis against any such modification of the final judgment

and decree of August 11, 1920, as is proposed by the defendants' counsel. The complainant does not believe that any modification is necessary or desirable, at this time, or that such a modification of the final judgment and decree is within the power or discretion of this Court at this time. If there is to be any modification at this time, the complainant urges that the same be by way of vacating, in view of the uniform rulings of all the other judges of this Court, of all provisions in the decree of last August which limits the plaintiff's rate and all provisions which undertake a "dating-back" of any rate ultimately fixed by public authority.

In Your Honor's Opinion of last August, fixing a rate to be charged under the final decree, pending the fixing of a new rate by the Legislature or other competent authority, Your Honor, after outlining your plan for making the rate, when so fixed by the Legislature or Commission, relate back to the date of Your Honor's decree, indicated that because the rate so limited by Your Honor would be all that the complainant could ever recover during the period—

"It should cover any rate which is within reasonable expectation. Just as when deciding whether an actual rate is invalid a court must take all doubts in favor of the rate, so when fixing a security, it should take all doubts in favor of the plaintiff's claims. In neither case has its finding any proper relation to the rate which in justice might be established by the authorities; it is concerned only with limits."

* * * * * * *

"Since the plaintiff must eventually account with the future rate in any event, I think it fair to protect it against the possibility that it may be so fixed. Any hardship to the public appears to me answered by the plaintiff's ability for any period to escape the jurisdiction of the State authorities.

"I have provided that if the State does not act before March first, 1921, the plaintiff shall have all the fund and shall be free to charge what it pleases. Such inaction would indicate that the State was contented to leave the matter in that form if the decree were affirmed. If so, I should of course no longer interfere with the plaintiff in pursuit of its rights. While that possibility is in fact too remote to be really very practical, nevertheless the decree must provide against all possible contingencies."

As to the status after March 1, 1921, Your Honor's Opinion moreover said:

"The decree itself fixes most of the questions which will arise pending the appeal. The stay need only provide in addition for the possible period beyond March first, 1921, before the appeal is decided. Of course it should not attempt more than to subject the sums impounded to the mandate of the Supreme Court; that court will have before it all the case and can make such final decree as it chooses."

The date fixed by Your Honor's Opinion and final decree of last August being now only a few days away, and the Legislature having been met in special session on public utility topics, among others, last autumn, within two months of Your Honor's decision, and having now been assembled in regular session in 1921 for about two months, without any action having been taken along the lines projected by Your Honor, the complainant company objects earnestly and emphatically against any modification of the final judgment and decree of August 11, 1920, which would

(*a*) undertake to continue the $1.20 limitation beyond March first, either indefinitely or to June first or any other date; or

(*b*) undertake to continue beyond March first, either indefinitely or to June first, or any other date, the so-called retroactive or "dating-back" features of the decree of August 11, 1920.

The complainant does not believe that the final decree need or should be modified, or that it can validly be now modified along any such lines as the defendant suggests. The complainant strongly urges that

11 (*a*) The $1.20 limitation be not extended at all;

(*b*) That the retroactive feature be not extended at all; and

(*c*) That all that might advisably be continued, after March first, is the impounding by the plaintiff gas company, pending the appeal if diligently prosecuted, of all sums collected by it in excess of the statutory rate.

Even if Your Honor should continue the so-called "retroactive" feature, obligating the complainant company eventually to "account" to its consumers as between the rate it does charge and the rate it should have charged, any continuance of the $1.20 limitation beyond March first would seem unjust and unreasonable, under the standards laid down by Your Honor in your opinion of last August, as above quoted, and in view of the facts to which I shall hereinafter refer.

IV.

Actual Operating Results under the $1.20 Rate.

When this cause was before Your Honor, on motion for final judgment last July and early August, Your Honor had before you the operating costs of the complainant company for the year 1918 and the first eight months of 1919. As to a few items entering into operating costs, there was before Your Honor proof of unit costs as of a later date in 1919, enabling the making up of a minimum
12 "present cost of manufacture and distribution" of gas practically as of the end of 1919 or early 1920, although not reflecting nearly all of the increased costs of labor and materials which became operative in the latter part of 1919. This fragmentary or minimum statement of "present cost" as of the end of 1919, as

shown in tabular form in the brief submitted by the Complainant to Your Honor, was employed by Your Honor in fixing a maximum rate as chargeable from August 5, 1920, to a date not later than March 1, 1921.

The heavy financial losses sustained by the complainant gas company, under the 80-cent rate, during the portion of the year 1920 preceding the decree of August 5, 1920, as well as the losses sustained by the complainant company during the period of test upon which Your Honor's decree was based, cannot be recouped by the complainant; but Your Honor is entitled, in formulating future action, to take into account the effects of the $1.20 limitation prescribed by Your Honor and how justice may best be done by Your Honor to a company which had earned and established its right, at least from and after August 5, 1920, to charge an adequate and reasonable rate, but which has for nearly seven months been held by Your Honor to a rate confiscatory in fact by a wider margin than was the 80-cent rate at the time this suit was started.

It is now practicable to place before Your Honor, in comparison and in contrast with the elements of cost making up the $1.20 rate as promulgated by Your Honor, the details of this company's actual experience under the first six months of the 1920 rate, the actual operating results during the period from August 1, 1920, to January 31, 1921, and likewise a statement of the actual present cost of manufacture and distribution of gas, as of this date in February, 1921.

These statements of the actual operating results under the $1.20 rate, of which the details are given hereinafter, show that during the first six months of the $1.20 rate, it yielded only 5.38 cents per thousand cubic feet for return on investment, instead of the 32.43 cents per thousand which Your Honor computed the complainant company was entitled to receive pending the fixation of a new rate by the Legislature or Commission. In other words, on the basis adopted by Your Honor, the rate during the first six months under the $1.20 rate, the period ended January 31, 1921, should have been $1.4705 instead of $1.20.

The figures hereinafter set forth show also that at the present time, the cost of making and distributing gas (exclusive of return on any gas company investment) exceeds $1.4947, instead of the $1.20 rate which the defendants ask Your Honor to extend indefinitely.

V.

The "Retroactive" Feature of Your Honor's Decree.

In view of these facts, and others of which details are given hereafter, the complainant submits that any uncertainties which may have existed in the mind of the Court in July and August of 1920, as to what would be the operating costs and revenues of the complainant following the entry of the decree, and which may have led Your Honor then to limit the rate of the complainant to $1.20, are non-existent now, as Your Honor now has

before you the actual current costs and revenues of the complainant under the $1.20 rate.

In the light of the substantial increases which have taken place in the complainant's operating costs since the date as of which Your Honor had before you last August data concerning the complainant's operations, and which are certain, beyound all peradventure, to continue for a period of time beyond which it is not supposed this Court would possibly consider the terms of the decree, it is respectfully but earnestly submitted that the application of the defendants should be denied.

In this connection, it is respectfuly pointed out that while provision was made by Your Honor's decree for a retroactive reduction of the $1.20 rate, in case the legislative authority should determine that the complainant was entitled to a rate of less than $1.20 from the time of the making of the decree in this cause, and that the consumers might thereupon be entitled to a refund of the difference between such retroactively fixed rate and the $1.20 rate, the complainant, on the other hand, was given no protection against the consumers or the consequences of the insufficiency of the $1.20 rate under the actual operation of the decree. To continue the $1.20 limitation would inflict confiscation by a wide, ruinous margin, and leave the complainant altogether remediless.

Furthermore, in view of the actual experience of the com-
15 plainant since August 11, 1920, when the decree fixing a $1.20 limitation was made, any rate fixed by the Legislature which would retroactively limit the charge which the complainant could collect and keep to an amount less than $1.20, would, by reason alone of the insufficiency of such a low rate to pay the actual proved expenses and afford a fair return to which the complainant was and is entitled, be void and unconstitutional, and an attempt now, by the Legislature or Commission, to establish and enforce a rate below $1.20, for any part of the period since August of 1920 or for any future period now susceptible of forecast, would compel the Consolidated Gas Company to embark upon new and additional litigation to establish the confiscatory character of such a low rate. The retroactive feature has been proved unnecessary, and the $1.20 limitation oppressive.

VI.

Subsequent Rulings of Other Judges as to the Fixation of a Limiting Rate in the Final Decree.

Before taking up the details of the complainant's actual results and present operating costs, under the $1.20 rate, it may be pertinent to refer to a number of things which have transpired since August of 1920, and which have a vital bearing upon the complainant's present insistence that the $1.20 limitation be removed and the "retroactive" feature either stricken from the present decree or at least not continued by any modification thereof at the defendants' behest.

In the first place, Circuit Judge Charles M. Hough had
16 before him in this Court, on October 13, 1920, the Report and Opinion of the Honorable Gordon Auchincloss, as Special Master, in the Kings County Lighting Company case. In confirming that Report, Judge Hough found that the company's costs were at least 96 cents per thousand cubic feet for the year 1920, aside from any return on investment. The learned Circuit Judge declined to fix any rate in his final decree and left the company to fix and put in force its own rates, without even a provision for impounding pending appeal. The company put in force a rate of $1.50 per thousand cubic feet and on December 30, 1920, the defendants asked Judge Hough to vacate the decree on the ground that a $1.50 rate was inequitable. This he declined to do, in a trenchant oral opinion, in which he said in part:

"I consider the word inequitable in the present connection to mean something so obviously wrong that it shocks the conscience of a fairly decent man who happens to be the Chancellor. I believe that at the present time and for a time in the future concerning which I cannot venture to even form an opinion, the most favorably situated gas making concern within the limits of the City of New York can not reasonably expect to make and distribute gas and pay interest (at rates now ridiculously low) upon the money it has borrowed in the past, for less than $1.20 per unit; and this gas company I am sure is by no manner of means the most favorably situated within the City's limits.

"I am also of the opinion that a twenty-five per cent profit (which is the difference between $1.20 and $1.50) is as a profit on
17 anything not so grossly inequitable as to shock the conscience of a decent man."

On November 19, 1920, Judge Mayer had before him in this Court the Report and Opinion in the New York and Queens Gas Company case, and after eliminating all reasonably contested items of the company's expenses, Judge Mayer found that the operating costs in 1919 exceeded $1.02 per thousand, aside from any return on the investment, were higher in 1920, and would be still higher. Judge Mayer likewise refused to fix any limiting rate in his final decree, and the company put and has in effect a rate of $1.25 per thousand, plus a service charge of 75 cents per month per meter, equivalent in average results to a "flat" rate of about $1.50 per thousand. This rate is now barely paying operating expenses, and hardly that.

The special statutory Court convened in this district pursuant to Section 266 of the Judicial Code, consisting of the Honorable Henry Galbraith Ward, C. J., the Honorable Charles M. Hough, C. J., and the Honorable Julius M. Mayer, D. J., upon an application for the modification of the temporary injunction orders in respect to the maximum rate to be charged thereunder, in an opinion dated November 26, 1920, said that the members of the Court were satisfied that as of that time none of the nine different gas companies in Manhattan, The Bronx, Brooklyn and Queens, whose applications were before it,

"can make or produce and distribute gas to private consumers
18 at less than, or close to, $1.00 per thousand cubic feet. Indeed, we are convinced that some of them must expend, at present, in order to make and distribute gas, slightly more than $1.00 per unit."

The Court held that, upon temporary as distinguished from final injunction, ten cents per thousand, over actual operating costs, should be allowed for return on investment, pending the trial and final decree in the action.

On January 10, 1921, the Honorable Albert H. Sewell, for many years a distinguished member of the Appellate Division of the Supreme Court for the Third Department, found as Official Referee, in the Richmond County Supreme Court, in the New York and Richmond Gas Company case, that the cost of making and distributing gas exceeded $1.00 as of August, 1920, and thereafter, aside from any return on the value of property. This distinguished jurist in the State Court refused to fix or limit the rate chargeable, in the final judgment entered on his findings, and the company put and has in effect a rate of $1.25 cents per thousand, plus a service charge of 75 cents per month, per meter, equivalent to about $1.50 per thousand, on a "flat" rate basis.

On February 11, 1921, the Appellate Division of the Supreme Court for the First Department unanimously affirmed a preliminary injunction granted the Bronx Gas & Electric Company, under which the company is charging a rate of $1.50 per thousand.

19 On February 16, 1921, there was filed in this Court the Report of the Special Master in the Central Union Gas Company and the Northern Union Gas Company cases. Eliminating contested items in pursuance of the rulings of this Court, the Report showed the costs of the Central Union Gas Company to be, in cents per thousand cubic feet of gas sold, aside from any return on the company's investment in property used in serving its consumers:

	Year 1919.	9 months of 1920.	As of Nov., 1920	As of Jan. 1 1921
Cost of Production	59.40c.	61.40c.	72.47c.	92.65c.
Cost of Distribution ...	29.24	31.61	34.37	34.37
Taxes	7.14	7.20	7.14	7.14
Renewals and Replacements	3.00	3.00	3.00	3.00
Total reasonable cost	$.9878	$1.0321	$1.1698	$1.3706
Adding the same figures for return on investment allowed by your Honor in the Consolidated case	.3243	.3243	.3243	.3243
Required rate ..	$1.3121	$1.3564	$1.4941	$1.6949

As to the Northern Union Gas Company, the Report of the Special Master, after eliminating contested items as above indicated, showed the following costs, in cents per thousand cubic feet of gas sold, aside from any return on the company's investment in property used in serving its consumers:

	1919.	1920.	As of Jan. 1, 1921.
Cost of Gas at Station	63.73¢	74.34¢	98.42¢
Cost of Distribution	26.43	30.23	31.19
Taxes	3.25	2.80	2.80
Renewals and Replacements (distributing system	2.00	2.00	2.00
Total reasonable cost	95.41¢	$1.0937	$1.3411
Adding the same figures for return on investment as allowed by Your Honor in the Consolidated case	32.43	.3243	.3243
Required rate	$1.2784	$1.4180	$1.6684

VII.

Actual Results During the First Six Months under the $1.20 Rate.

The following table shows the actual cost of the production and distribution of gas, plus the amount required as return upon the company's investment as computed by this Court, during the six months' period beginning with August 1, 1920, and ending January 31, 1921. The first column shows the elements of the $1.20 rate as made up by Your Honor, and the second column shows the actual cost of these items for the first six months under the 1920 rate (exclusive of any return on investment in other gas companies' property used by the complainant and of commissions on gas purchased), in cents per thousand cubic feet of gas sold:

	As fixed by Hand, D. J.	Actual results.
Cost of production	56.00¢	76.10¢
Cost of Distribution	23.00	30.32
Taxes	9.00	10.17
Renewals and replacements	3.50	3.86
Total actual cost	91.50¢	$1.20.45
Credit miscellaneous operating revenue	7.30	9.20
Total actual cost after giving effect to miscellaneous operating revenue	84.20¢	$1.11.25
Required for return of 8% on investment as computed by Hand, D. J.	32.43	32.43
Federal income tax based upon 8% return	3.37	3.37
Rate required	$1.20.00	$1.47.05

The $120 rate limitation prescribed by this Court last August is thus shown by actual experience, during the first six months of its actual operation, to have held the company to a rate 27.05
22 cents per thousand cubic feet of gas sold less than the complainant was justly entitled to, upon the basis of its actual operating results during the period. The $1.20 rate yielded only 5.38 cents per thousand for return on investment instead of the 32.43 cents to which the Court found the company was entitled.

Present Actual Costs under the $1.20 Rate.

At the present time, the following shows the rate now required to be charged, based on present costs (exclusive of return on investment in other gas companies' property used by the complainant and of commissions on gas purchased):

	Cents per M cu. ft. sold.
Present cost of production	81.65¢
Present cost of distribution	26.68
Renewals and replacements	03.80
Taxes	10.01
Total present cost	$1.22.14
Credit miscellaneous operating revenue	.08.47
Total present cost after giving effect to miscellaneous operating revenue	$1.13.67
Required for return of 8% on investment as computed by Hand, D. J.	32.43
Federal Income Tax based on 8% return	03.37
Rate now required, at least	$1.49.47

23 The $1.20 rate is, therefore, at least 29.47 cents per thousand cubic feet of gas sold less than the rate to which the complainant is justly entitled under present day operating costs. In point of fact, it is already semi-officially known that the new tax rate of the City, County and State will be higher than the 1920 rate, to an extent which will add 1.8 cents to the costs shown in the above table, making the present deficiency below a fair return at least 31.27 cents under the $1.20 rate and making the rate now required at least $1.50. It should, moreover, be stated that the above table of present cost is computed on the basis of the 1920 actual sales of the complainant, viz. 20,753,111,000 cubic feet, whereas the actual sales during the six months' period ended January 31, 1921, were 9,677,150,000, or substantially less than half of the 1920 sales. If the present cost had been figured, as in entire justice to the present situation it should be, on the basis of the present rate of sales of gas, the figures for present cost of distribution, taxes, and renewals and replacements, would show increase, rather than decrease, in comparison with those same items for the six months' period, and the rate now required would exceed $1.50 by several cents. Actually, the cost of none of these items has decreased, thus far in 1921.

24 VIII.

Present Operating Costs Alone and the Relative Cost of Coal-gas and Water-gas.

It will be observed that the operating costs during the period from August 1, 1920 to January 31, 1921, and at the present time (exclusive of any return upon other gas companies' property used by the complainant and of commissions on gas purchased), have exceeded the 1918-1919 operating costs upon the basis of which the $1.20 limitation was fixed by this Court, and this is more clearly shown by the following comparison of operating costs alone:

	Figures used by Judge Hand on 1918-1919 operations.	6 months, Aug. 1, 1920, to Jan. 31, 1921.	Present cost.
Cost of Production	56.00¢	76.10¢	81.65¢
Cost of distribution	23.00	30.32	26.68
Renewals and replacements	3.50	3.86	3.80
Taxes	9.00	10.17	10.01*
Total	91.50¢	$1.20.45	$1.22.14

This summary table of operating costs only might be completed from the more detailed tables above given, but the foregoing summary does disclose the factors which would make altogether unwar-

*For 1921 it is now semi officially known that the new tax rate will add 1.8 cents per thousand to the cost of the tax payments required of the plaintiff company.

ranted, ruinous and oppressive any continuance of the $1.20 limitation.

25 With respect to the operating revenues and expenses of the complainant gas company during the first six months under the $1.20 rate, and during the calendar year 1920, and at the present time, I beg leave to submit any further details possibly desired by the Court, at any time convenient for your Honor.

At the present time, in the plants of the Consolidated Gas Company and the Astoria Light, Heat and Power Company, the cost of making water gas, with oil costing 12¼ cents per gallon plus lighterage, is between three and four cents higher than the cost of making coal gas, with coaking coal at present prices. During the six months ended January 31, 1921, the cost of water gas was substantially lower than the cost of coal gas, because up to December 15, 1920, gas oil was being received by the complainant at 7.1 cents per gallon, under an exceptionally favorable contract.

The relative cost of coal and water gas manufacture varies from time to time, according to the relative cost of coal and oil.

Within the limits permitted by the candle-power standard and by the relationship of the demand for gas to the combined capacity of the complainant's coal-gas and water-gas plants, the relative quantity of the two kinds of gas made by the complainant varies according to the relative cost of manufacture and according to the available supply of coal.

26 When, as during much of the fall of 1920, coal is scanty in supply and high in price, and oil is being received at a price making water-gas more economical, larger quantities of water-gas are made, and vice versa. This is the economy and security afforded by a diversified plant, as has been demonstrated by the complainant's experience over many years.

IX.

Increases in Cost of Materials and in Rates of Pay of Labor Since the Period Covered by the Proofs Before Your Honor Last July.

Conditions affecting the cost of making and distributing gas have operated to increase substantially, rather than diminish such cost since the period covered by the proofs before this Court as a basis for the decree of August 11, 1920. Operating costs are substantially higher now than in 1918, 1919 or 1920. So far as the gas industry is concerned, the recession in prices has not involved at all the rates of pay of labor in the gas industry and has not affected the prices of materials constituting any considerable part of the outlay of gas companies. The decrease, in 1920 and 1921, of the prices of materials, below the 1919 and 1920 prices, has not affected items which make up more than a small fraction of the company's total outlay for materials and a still more insignificant fraction of its aggregate expenses of distribution.

27

X.

Increase in Wages Paid to Labor.

In every department of the complainant company, there has been a necessary increase in the rates of labor, and the complainant is obliged to adhere for as long a time as any forecast can be ventured, to at least the present scale of wages, since the labor employed in the gas industry did not enjoy, with the labor employed by other industries, the ascending and descending fluctuations which obtained during and after the war period. For example, the rates of wages paid at the manufacturing stations per hour for the period of eight months ended August 31, 1919, was 46.11 cents; for the year 1919 was 47.24 cents; and for the year 1920 was 56.28 cents; and the average rate paid per hour in January, 1921, was 60.43 cents, an increase over the rate paid for the eight months' period ended August 31, 1919, of 14.32 cents, or more than 31 per cent.

In the fitting shops the average rate for the eight months' period of 1919 was 43.24 cents; for the year 1919, 45.53 cents; and for the year 1920, 56.39 cents. The rate paid in January, 1921, as compared with the rate paid for the eight months ended August 31, 1919, shows an increase of 13.15 cents, or more than 30 per cent.

In the mains and services department the average hourly rate for the first eight months of 1919 was 43.07 cents; for the year 1919, 44.32 cents, and for the year 1920, 61.42 cents. The average
28 hourly rate in January, 1921, compared with the eight months' period of 1919, shows an increase of 18.35 cents, or more than 42 per cent.

XI.

Increases in Prices Paid for Coal and Oil.

The principal items entering into the cost of gas are anthracite coal or coke used for generator fuel in the process of water gas manufacture, bituminous coal used for the production of coal gas, gas oil used for the enrichment of both coal and water gas, so as to impart to these gases the illuminating power of 22 candle power as prescribed by statute, and labor.

So far as practicable, the complainant must make term contracts for the supply of coal and oil, in order to insure a continuous and dependable supply of these materials for uninterrupted service. The complainant has been compelled to resort to "spot" purchases of coal only because of the stringency in supply and emergency which existed in the depletion of the amount required to be stored for consumption.

XII.

As to Prices for Gas Oil.

The average price paid for gas oil by the complainant during 1918 was 6.5 cents; during 1919, 6.6 cents, and during 1920 7.1

cents, up to December 15th. The price per gallon, under a
29 contract which the complainant made with the Standard Oil Company of New Jersey, which has for many years supplied its gas oil requirements, since December 16, 1920, has been 12½ cents per gallon, at the refinery in Bayonne, New Jersey. This contract covers the supply of gas oil to meet the complainant's requirements for the period ending June 30, 1921, with the option to plaintiff to renew the contract for the succeeding six months of the year.

XIII.

As to Prices for Coal.

At the time the complainant made the gas oil contract for its supply during the year 1921, the price was the best at which it could secure a contract from a reliable gas oil dealer for the supply of the quantity required by the complainant. In view of the fact that it takes on the average 4.1 gallons of gas oil to enrich water gas in order to meet the twenty-two candle power requirement of the statute, the increase in the complainant's gas oil costs under the new price is approximately 22 cents per thousand cubic feet of gas made.

The average price which the complainant paid for anthracite coal delivered at its docks, in 1918, was $6.68 per ton; in 1919, $7.98 per ton, and in 1920, $10.75 per ton. The present price which the complainant is being charged for anthracite generator coal is $11.57 per ton.

In this connection, however, it should be pointed out that the drop in coal prices has not as yet effected a reduction in the operat-
30 ing costs of this complainant, since the complainant was under the necessity of storing a large supply of coal to meet its winter requirements, and it was unable to secure anything like the amount which is usually stored by it for winter requirements. The coal so stored is now being used by the complainant, and the cost of such coal determines the present coal costs to the complainant.

The average price of bituminous coal used for the production of coal gas paid by the complainant in 1918 was $4.97; in 1919, $7.77, and in 1920, $8.48. As of the present time, the price is $8.39. The same factor which tends to make the cost for the coal element higher at the present time than it would be if coal were now purchased enters into the cost of bituminous coal.

With respect to the prospects as to coal prices for the new coal year, beginning April 21, 1921, the counsel for the defendant public authorities have recently, upon the trial of the case of The Standard Gas Light Company vs. Newton, et al., interrogated at great length Mr. John P. Huddell, an experienced dealer in and purchaser of coal, who knows every phase of the coal business from the mining to the delivery alongside, and who has been employed by the Consolidated Gas Company during the past year to put forth special efforts to keep its supply of coal adequate, constant in supply, and reasonable in price, under the conditions from time to time prevailing. Mr. Huddell's testimony discloses the factors which he believes will operate

to prevent decreases in the 1921 contract prices for generator
31 coal or gas coal as compared with the prices specified in the 1920 contracts, e. g., the increase cost of mining, the rates of pay of labor at the mines, the increased cost of lighterage, the increased rates for railroad transportation, and the like. The railroad freight alone now costs more than the coal itself formerly cost delivered alongside.

Mr. Huddell's testimony, on examination by the defendants, is concrete and practical. It is found on pages 714 to 743 of the mimeographed record in the Standard Gas Light Company case (hearing of February 11, 1921). We submit it for your Honor's consideration, and by this reference make it a part hereof.

The increase in freight rates entering into the cost of coal to the complainant, which became effective by order of the Interstate Commerce Commission, subsequently to your Honor's decree of last August, amounts to about $.96 per gross ton for anthracite generator coal and to about $.76 per gross ton for bituminous coal.

XIV.

Prices of Other Materials.

The present cost of practically all other materials used by the complainant is much greater than the cost in 1918 and 1919. The recessions which have taken place in prices of materials have affected the amount expended by the complainant only to the extent of a
small fraction. On the other hand, the prices for the prin-
32 cipal items of materials used by the complainant, even aside from coal and oil, have steadily increased, and the peak prices of 1920 have not yet come down.

XV.

Cost of Work on Mains and Services.

For the past several years the complainant has had the advantage of a substantial saving in the costs of materials by reason of the fact that it made a contract several years ago for the supply of mains and pipes. The cost of these materials has been steadily increasing, but the complainant has been charging into its own costs the prices paid under the old contract. The quantities of mains and services supplied under the old contract has been practically exhausted, so that in the future the complainant will be obliged to pay prices for these materials much in excess of those which it charged into its operating expenses during the past few years.

XVI.

Effect of the $1.20 Rate on the Complainant's Credit and Capacity to Serve the Public.

Any continuing restriction on the part of this Court upon the complainant's right to charge a reasonable rate, which includes a fair return upon its undoubted investment, results not only in enormous loss which can in no way be recouped, but also in a serious impairment of the credit which is absolutely essential for the continuance of efficient service and the meeting of the increased demands of the public upon so important a utility as that of the complainant.

XVII.

This affidavit is submitted by me without prejudice to the contention of the complainant that this court had no power or jurisdiction originally to impose the conditions in respect to the rate to be charged by the complainant which are contained in the decree of August 11, 1920, and has no power now either to extend the effectiveness of those conditions or to impose modified conditions of a similar nature.

It is respectfully submitted that the application of the defendants should be in all respects denied and that the rate-limiting features of the decree of August 11, 1920, should be vacated.

ROBERT A. CARTER.

Sworn to before me this 26th day of February, 1921.

SARAH ISABEL CLASSON,
Notary Public.

Kings Co. Clerk's No. 208.
New York Co. Clerk's No. 528.

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Before Learned Hand, D. J.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

William L. Ransom, being duly sworn, deposes and says:

I have been trial counsel for the complainant in this case and am familiar with the proceedings had herein.

After the final hearing of this cause, this Court made and entered a final decree herein on August 11, 1920.

An appeal from this decree was taken by each of the defendants in this cause, and the following proceedings have been had with reference to such appeal:

On September 9, 1920, the defendants presented to the Honorable Martin T. Manton, Circuit Judge, their petition for an appeal, which was on that day allowed and a bond dispensed with. A citation was issued on that date to the complainant and was served upon the solicitors for the complainant on September 10, 1920, directing its appearance in the Supreme Court of the United States on October 9, 1920. The time for the filing of the record in the Supreme Court has been from time to time extended by this Court until March 9, 1921. The preparation of the record on appeal is now well advanced, and the record will probably be filed with the Clerk of the Supreme Court within the time now limited.

The complainant gas company appealed from that portion of the final decree herein comprised in paragraphs 6 to 14 inclusive, and thereby raised the question of the power of the Court to include in its final decree provisions such as those of the said paragraphs. Upon the appeal of the complainant the following proceedings have been had:

On November 10, 1920, the complainant presented to the Honorable Learned Hand, District Judge, its petition for appeal in this cause, which was thereupon allowed and the bond fixed at $500. Such bond was duly filed and approved on that date, and a citation issued and duly served on the defendants, requiring their appearance in the Supreme Court of the United States on December 10, 1920. The time for the filing of the complainant's record on appeal in the Supreme Court has been extended by this Court until March 9, 1921, at which time the record will probably be duly filed with the Clerk of the Supreme Court.

It is respectfully submitted in behalf of the complainant that this Court had no power or jurisdiction to make the provisions in the decree from which the complainant has appealed, and now has no power or jurisdiction either to extend their effectiveness or to change their terms, except to vacate those provisions of the decree. The complainant hereby respectfully reserves every objection to the power or jurisdiction of this Court to grant the application of the defendants upon this motion and urges that the decree be not modified unless by way of vacating the provisions from which the complainant has appealed. In particular, the complainant protests against any extension of the $1.20 limitation on its rate or the "retroactive" feature of the decree of August 11, 1920.

WM. L. RANSOM.

Sworn to before me this 26th day of February, 1921.

SARAH ISABEL CLASSON,
Notary Public.

Kings Co. Clerk's No. 208.
New York Co. Clerk's No. 528.

37 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Before Learned Hand, D. J.

Supplemental Affidavit in Opposition to the Defendants' Motion for Modification of the Decree of August 11, 1920.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

Robert A. Carter being duly sworn, deposes and says:

38 Supplementing my affidavit submitted in opposition to the defendants' motion for modification of the decree entered herein on August 11, 1920, I submit herewith a schedule, which has been prepared under my immediate direction and supervision, setting forth in detail the cost to the Consolidated Gas Company of making and distributing gas as of February 1st, 1921.

The items embraced in the attached schedule, which shows the water gas costs, the coal gas costs, and the distributing and general expense, and a resumé of such costs and expense, correspond to the items set forth in the "Table of Cost of Making and Distributing Gas as of Early 1920," contained at pages 58 to 60 of the memorandum dated July 6, 1920, submitted to your Honor by the complainant in support of its motion for final judgment. The tabular statement of the cost of making and distributing gas as of early 1920 was based upon the proofs in the record of the hearings before the Special Master, and I believe that the figures of cost so shown as of early 1920 were employed by your Honor in fixing a maximum rate as chargeable from August 5, 1920, to a date not later than March 1, 1921.

The statement made in my first affidavit submitted upon this motion of the present actual cost of making and distributing gas for the consumers of the complainant (amounting to $1.2214 per thousand cubic feet sold), before giving effect to Miscellaneous Operating Revenue, excluded any return upon the property owned either by the complainant, the Astoria Light, Heat and Power Company, or other companies, and used by the complainant for the gas business with its own consumers, and also excluded any amount paid for

39 gas purchased in excess of station cost. The attached table of present cost shows the total cost to the Consolidated Gas Company of the gas sold by it to its own consumers, exclusive of

return on the investment of the Consolidated Gas Company, but including return on investment in the properties of other gas companies used in the service of the complainant's consumers.

It appears from the attached table that the present net cost of gas to the Consolidated Gas Company, excluding any return on the complainant's investment, but including interest on others' properties, and after deducting Miscellaneous Operating Revenues, is $.2311 per thousand cubic feet of gas sold, and that the excess of such present cost over the statutory rate is $.4316 per thousand cubic feet of gas sold. To this operating deficit there must be added a fair return upon complainant's investment in its gas business, in order to arrive at a fair rate for the service being rendered to the complainant's consumers.

ROBERT A. CARTER.

Sworn to before me this 26th day of February, 1921.

SARAH ISABEL CLASSON,

Table of Cost.

To Consolidated Gas Company of Making and Distributing Gas as of February 1st, 1921.

Water Gas Costs.

					Cost per M cubic feet.
Generator Fuel (Anthracite):					
To Generator,	32.50 lbs. per M @	$11.57 per gro. ton			$.1679
" boilers,	2.50 " " " @	11.57	do.	$.0129	
Boiler Fuel (Buckwheat),	11.50 " " " @	6.00	do.	.0308	
					.0437
Labor Handling					.0069
					$.2206
Gas Oil,	4.10 gals. " " @	.1235 per gal.			.5064
Iron Mass, City Water, etc.					.0100
Total Cost of Materials					$.7370
Residual Credit—Tar,	.656 gals " " @	$.06	" "	.0394	
" " Drip Oil,	.0615 " " " @	.057	" "	.0035	
					.0429
Net Cost of Materials					$.6941
Gas Making Labor					.0300
Repair—Labor					.0150
Repair—Material					.0150
Miscellaneous Works Expense					.0125
Gas Storage Expense (Works and Distributing Holders)					.0100
Cost of Manufacture					$.7766
Cost of Manufacture per M cubic feet of gas sold					.8255

41 Coal Gas Costs.

			Cost per M cubic feet.
Gas Coal (Bituminous),	200 lbs. per M @ $8.39 per gro. ton		$ .7491
Boiler Fuel (Anthracite),	10 lbs. " " @ 6.00 " " "		.0268
Labor Handling			.0220
Cost of Coal Including Handling			$ .7979
Residuals:			
Coke & Breeze,	100 lbs. per M @ 8.74 per gro. ton	$ .3892	
Coal Tar,	1.5 gal. " " @ .0528 " gal.	.0831	
Ammonia Liquor (Sulphate),	1.5 lbs. " " @ .0199 " lb.	.0298	
Ammonia (Absolute),	.03 lbs. " " @ .1200 " lb.	.0036	
Ammonia Sulphate,	.30 lbs. " " @ .0550 " lb.	.0165	
Cyanogen,	.15 lbs. " " @ .4000 " lb.	.0600	
		.5822	
		.2057	
Handling Residuals (Including Cyanogen Extraction)		.0200	
Net Cost of Coal		.2857	
Oil Enrichment—Water Gas	1.6 gal. per M @ $.1235 per gal.	.1977	
Tar Credits	.25 " " " @ .06 " "	.0150	
Net Cost of Enrichment		.1827	
Iron Oxide, City Water & Handling Spent Material, etc		.0125	
Gas Making Labor		.1100	
Repair Labor		.0300	
Repair Material		.0200	
Miscellaneous Works Expense		.0150	
Gas Storage Expense (Works and Distributing Holders)		.0100	
Cost to Manufacture		$ .7359	
42 Cost of Manufacture per M cubic feet sold		.7827	
Average Station Cost of Mixed Gas (on ratio of 20.85% Coal Gas and 79.15% Water Gas)		$ .8195	

Distributing and General Expenses.

Repairs to Mains, Services, Meters and Miscellaneous Repairs.	$ .0576	
Work on Consumers Premises (setting appliances, burner work, and jobbing Sundries)	.0263	
Meter and Installation Work (Gas Meter and Installation Work)	.0189	
Distribution and Superintendence, Street Department and Shops	.0219	
Commercial Expense	.0682	
General and Miscellaneous Expense of Consolidated Co. $ .0681		
Add General and Miscellaneous Expense of the Astoria Company in making gas for the Consolidated Gas Company	.0058	
	.0739	
Total Distributing and General and Miscellaneous Expense		.2668

		Cost per M cubic feet.
Renewals and Replacements of Property used in the Service of Consumers of Consolidated Gas Company		.0380
Taxes paid directly by Consolidated Gas Company	.0630	
Taxes paid by Consolidated Gas Company as part of payment for use of others' properties used in making and Distributing gas for Consolidated Gas Company	.0365	.1001
Interest paid to other Companies on Investment in Property used in manufacture and transmission of gas for the Consolidated Gas Company	.0012	
Percentage paid on holder cost of gas delivered under Agency Agreement	.0034	.0046
Total Cost of Gas Sold by the Consolidated Gas Company, exclusive of return on Investment of Consolidated Gas Company, but including return on others' properties used in service of Consolidated Gas Company's Consumers		$1.3160

6 Résumé.

Cost of Production (including Gas Storage)	$.8165
Cost of Distribution and other Expenses above	.2668
Renewals and Replacements	.0380
Taxes as above	.1001
	$1.2214
Miscellaneous Operating Revenue	.0847
Cost less Miscellaneous Operating Revenue	$1.1367
Interest paid to other Companies on Investment in property used in the manufacture of gas for the Consolidated Gas Company	.0046
Net Cost of Gas to the Consolidated Gas Co. (excluding any return on investment of the Consolidated Gas Company but including interest on others' properties and after deducting Miscellaneous Operating Revenues)	$1.2313
Income from Sales of Gas	.7995
Excess of Cost as above over Statutory rate	$.4318

41 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Before Learned Hand, D. J.

Second Supplemental Affidavit in Opposition to the Defendants' Motion for Modification of the Decree of August 11, 1920.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

Robert A. Carter, being duly sworn, deposes and says:

43 I have had prepared under my immediate direction and supervision a statement from the books of account and records of the Consolidated Gas Company and the Astoria Light Heat and Power Company, which is attached hereto, and which is correct setting forth the details of the actual cost of the production and distribution of gas for the complainant's consumers, exclusive of any return on investment in other gas companies' properties used by the complainant and of commissions on gas purchased during the six months' period beginning with August 1, 1920, and ending January 31, 1921, of which a summary is set forth on pages 17 and 20 of my prior affidavit upon this motion.

ROBERT A. CARTER.

Sworn to before me this 26th day of February, 1921.
SARAH ISABEL CLASSON,
Notary Public.

Kings Co. Clerk's No. 208.
Kings Co. Reg. No. 2210.
New York Co. Reg. No. 2426.
Commission expires March 30, 1922.

Cost of Production and Distribution, Quantities and Costs of Material and Labor—Coal Gas Manufacture, Six Months Ended January 31, 1921.

(Exclusive of Return Paid on Investment in Other Gas Companies' Property and of Commissions Paid for Gas Purchased.)

	Quantity.	Unit price.	Amount.	Cost per M cubic feet made.	Material per M cubic feet made.
Cost of Production—Coal Gas:					
Caking Coal	271,302.60 Tons	$9.5614 per Ton	$2,599,781.45	$.9250	216.70 lbs.
Labor, etc., Handling.					
Coal, including handling			44,311.88	.0157	
			$2,644,093.33	.9407	
Deduct Residuals:					
Coke	271,302.60 chaldn.	6.025 chaldn.	1,638,196.18	.5829	0.0967 chaldn.
Coal Tar	3,377,365 gals.	.0553 gal.	186,684.98	.0664	1.20 gal.
Ammoniacal Liquor	4,753,952 lbs.	.0206 lb.	97,786.61	.0348	1.69 lb.
Ammonia	340,390 lbs.	.4618 lb.	157,204.39	.0559	0.12 lb.
Ammonia Sulphate	86,463 lbs.	.1200 lb.	10,375.56	.0037	0.03 lb.
Cyanogen	460,679 lbs.	.0419 lb.	19,291.59	.0069	0.16 lb.
Carbon	36,000 lbs.	.0100 lb.	360.00	.0001	0.01 lb.
Total Residuals			$2,109,899.31	$.7507	
Deduct Residuals Expense:					
Coke			$77,695.86	.0276	
Other Residuals			42,288.77	.0151	
Total Residual Expense			$119,984.63	$.0427	
Net Credit from Residuals			$1,989,914.68	$.7080	
Net Cost of Coal Carbonized			$654,178.65	$.2327	

Cost of Production, Distribution, etc.—Continued.

	Quantity.	Unit price.	Amount.	Cost per M cubic feet made.	Material per M cubic feet made.	
Brought forward—Net cost of coal carbonized			$654,178.65	$.2527		
Retort and Boiler Fuel:						
Retort Fuel—Coke	50,656,740 lbs.	$ .0025 lb. (100)	270,385.87	.0881	24.44	lbs.
Retort Fuel—Coal	681.63 Tons	7.0111 per ton	5,262.46	.0019	0.54	lbs.
Boiler Fuel—Coal			845,010.19	.0100	0.76	lbs.
Boiler Fuel—Coke and Breeze	9,277,000 lbs.	.2403 lb. (100)	1,294.48	.0005		
Labor, Cartage and Handling						
Total Retort and Boiler Fuel			$328,082.78	$.1107		
Net Cost of Coal Carbonized and Fuel			$982,261.23	$.3634		
		.6843 gal.	375,894.85	.1338	1.59	gals.
Gas Oil for Enriching	549,408 gals.	.2515 lb.	17,675.12	.0063	0.25	lb.
Iron Mass	70,285 lbs.	41.60 M. c. f.	5,850.97	.0021	2.08	cu. ft.
Water	5,850,0[illegible]0 cu. ft.		6,941.48	.0025		
Sundry Supplies						
Total cost of Manufacturing Materials			$1,388,722.75	$.4941		
Deduct Residuals—Tar	723,536 gals.	.0470 gal.	33,986.14	.0121	0.26	gal.
Drip Oil	5,141 gals.	.0545 gal.	280.18	.0001	0.002	gal.
Total Tar and Drip Oil Residuals			$34,266.32	$.0122		
Net Cost of Manufacturing Materials			$1,354,456.43	$.4819		
Gas Making Labor			277,953.79	.0989		
Total Materials and Labor			$1,632,409.22	$.5808		
Repair Labor			[illegible]	[illegible]		
Repair Material			[illegible]	[illegible]		

Total Cost Gas Made—Public					
10	2,810,501,000 cu. ft.			$23,938,861.07	$8.7931

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Consolidated Gas Company of New York

(Including Astoria Light, Heat & Power Company).

Cost of Production and Distribution, Quantities and Costs of Material and Labor—Water Gas Manufacture, Six Months Ended January 31, 1921.

(Exclusive of Return Paid on Investment in Other Gas Companies' Property and of Commissions Paid for Gas Purchased.)

Cost of Production—Water Gas:	Quantity.	Unit price.	Amount.	Cost per M cubic feet made.	Material per M cubic feet made.
Generator Coal	20,545,720 Tons	$10.5576 Ton	$216,953.44		
Generator Coke	214,219,840 lbs.	.4577 lb. (100)	980,458.16	$8.0357	7.56 lbs.
Boiler Fuel—Coal	4,013.48 Tons	8.0223 Ton	42,709.57	.1248	27.26 lbs.
Boiler Fuel—Coke and Breeze	90,557,920 lbs.	.3931 lb. (100)	147,251.36	.0054	1.40 lbs.
Boiler Fuel—Water Gas Tar	4,580,513 gals.	.0472 gal.	216,728.80	.0187	5.16 lbs.
Labor, Cartage, etc., Handling				.0276	0.58 gal.
Total Water Gas Fuel			70,253.44	.0097	
			1,743,930.15	.2219	
Gas Oil	33,208,729 gals.	.0832 gal.	2,770,489.07	.3525	4.24 gals.
Iron Mass	82,578 lbs.	.2649 lb.	21,874.62	.0028	.01 lb.
Shavings	12,122 lbs.	.0624 lb.	756.78	.0001	.002 lb.
Water	16,540,920 cu. ft.	$1.09 M. cu. ft.	16,646.91	.0021	2.11 cu. ft.
Sundry Supplies			10,076.46	.0013	
Cartage—Special materials			17,855.67	.0023	
Total Materials			1,860,629.62	.3828	

Cost of Production, Distribution, etc.—Continued.

	Quantity.	Unit price.	Amount.	Cost per M cubic feet made	Material per M cubic feet made
Deduct Residuals:					
Water Gas Tar	[illegible]	.0180 gal.	260,859.12	.0082	0.80 gal.
Drip Oil	581,582	.0520 gal.	30,981.77	.0042	0.07 gal.
Total Residuals			291,840.89	.0124	
Deduct Residual Exports			3,755.79	.0005	
Net Credit from Residuals			289,282.10	.0119	
Net Materials			1,251,042.92	.5409	
Gas Making Labor			257,920.72	.0328	
Total Materials and Labor			1,508,963.64	.5737	
Repair Labor			145,808.43	.0186	
Repair Material			150,103.27	.0191	
Miscellaneous Works Expense			122,086.34	.0156	
Electric Power House Operating			11,251.64	.0015	
Total Water Gas Made					
Public 15	7,859,232,000 cu. ft.		4,939,253.28	.6285	

Consolidated Gas Company of New York.

(Including Astoria Light, Heat & Power Company.)

Cost of Production and Distribution, Combined Coal and Water Gas Manufacture—Cost of Production.

(Exclusive of Return Paid on Investment in Other Gas Companies' Property and of Commissions Paid for Gas Purchased.)

	Cubic feet.	Amount.	Cost per M cubic feet.
Coal Gas Made.....Folio 11	2,810,591,000	$2,088,903.07	$.7361
Water Gas Made.....Folio 12	7,859,392,000	4,939,253.28	.6285
	10,669,983,000	$7,008,156.35	$.6568
Add or Deduct Gas Transferred:			
Gas delivered to Central Union Gas Company, Net.....	25,063,500	$13,264.07	$.5459
Gas delivered to Standard Gas Light Company, Net.....	31,423,200	16,778.84	.5340
Gas received from New Amsterdam Gas Company, Net.....	80,326,100	53,028.87	.6084
Gas received from New York Mutual Gas Light Company, Net.....	111,040,100	131,083.63	.3537
Use of New York Mutual Gas Light Company's Plant, Net..	.....	50,000.00	.....
	164,580,800	$236,059.53	.....
	10,834,372,800	$7,213,296.88	$.6658
Gas Storage.....	.....	90,698.67	.0083
	10,834,372,800	$7,209,875.55	$.6747
Operation and Maintenance of 10th and 42nd St. Stations..	.....	54,685.19	.0050
Total Cost of Production—Coal & Water Gas—Folio 4.....	10,834,372,800	$7,264,561.74	$.6797
Increase in Stock on Hand....	12,165,000		
Used by Consolidated and Astoria Companies.....	24,171,700		
Gas Sales to Consumers.....	9,677,134,800		
	9,723,474,500		
Unaccounted for due to Condensation, etc.....	1,110,898,300	(10.25%)	
	10,834,372,800		

50 **Consolidated Gas Company of New York.**

(Including Astoria Light, Heat & Power Company.)

Cost of Production and Distribution, Six Months Ended January 31, 1921.

(Exclusive of Return Paid on Investment in Other Gas Companies' Property and of Commissions Paid for Gas Purchased.)

	Amount.	Cost per M cubic feet sold.
Total Cost of Production (Folio 13)	$7,364,564.74	$.7619
Cost of Distribution and other Expenses:		
Distribution, Superintendence, Supplies and Expenses	234,088.08	.0243
Meter and Installation Work	299,061.69	.0317
Work on Consumers' Premises	294,382.32	.0304
Repairs of Street Mains	121,136.20	.0125
Repairs of Services	44,299.13	.0046
Repairs of Meters	300,873.88	.0311
Repairs of Buildings	6,270.25	.0006
Repairs of Tools	8,091.41	.0009
Repairs of Gas Appliances	116,326.52	.0120
Street Lighting Expense	1,183.23	.0001
Commercial Expense	759,489.54	.0785
Salaries General Office	233,089.58	.0241
Supplies and Expenses General Office	100,569.52	.0104
Legal Expense	15,063.84	.0015
Claims and Arrears Expenses	16,483.63	.0017
Insurance	77,045.97	.0080
Vacation and Sickness	49,991.37	.0052
Contributions to Employees' Aid Society	23,613.39	.0024
Superannuation	44,929.53	.0046
Stable Expense	27,071.93	.0028
Automobile Expense	113,329.38	.0117
Claims for Damages	6,047.65	.0006
Undistributed Adjustments	106,257.96	.0110
Duplicate Gas Charges	38,681.08	.0040
Uncollectible Bills	11,478.16	.0012
Use of Distributing System	123,040.96	.0127
Interest on Consumers' Deposits	25,855.61	.0027
Miscellaneous General Expense	64,509.78	.0067
Gas Rate Appeal No. 2	509.96	.0001
Total Cost of Distribution and other Expenses	2,933,728.18	.3032
Renewals and Replacements	3,73,161.29	.0386
Taxes and Interest thereon	984,709.77	.1017
Total Cost of gas sold by Consolidated Gas Company	11,656,169.28	1.2045
Deduct: Income from sale of gas	7,735,539.77	.7994
	$3,920,629.51	.4051

Deduct: Miscellaneous Operating Revenue:		Amount.	Cost per M cubic feet sold.
Rent from Gas Appliances.....	$570,565.80		
Gross Profit from Sales of Gas Appliances	244,253.08		
Interest on Bank Balances....	14,606.81		
Interest on Consumers' Final Bills	206.67		
Rent of Jointly Used Facilities (Net)	45,914.41		
Miscellaneous Rent Revenue (Net)	15,538.92		
		891,145.69	.0920
Net Deficit from Operations.....		$3,029,483.82	.3131

51 *Affidavit of Archibald S. B. Little.*

United States District Court, Southern District of New York.

Consolidated Gas Company of New York, Complainant,

against

Charles D. Newton, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

United States of America,
Southern District of New York,
State, County and City of New York, ss:

Archibald S. B. Little, being duly sworn, deposes and says:

I am an engineer by profession, and in my testimony in the above entitled case my training and experience were fully stated in connection with the design, construction, operation and regulation of gas utilities from the year 1894 to the end of the year 1919. Since then I have been actively engaged as an engineering expert in connection with the Public Service Commission gas rate investigations affecting various cities in the State of Illinois and State of South Carolina, as well as in the cases of The Brooklyn Union Gas Company before this Court, and New York and Richmond Gas Company in the Supreme Court of this State.

There is required in the manufacture of coal gas, low sulphur bituminous coal, and this can now be procured in quantities sufficient for all purposes at prices not more than one third of those prevailing during most of the year 1920.

52 It is part of my duty to keep informed on all matters pertaining to the production of gas, and I am able to state that good quality, high volatile, low sulphur gas coal can be purchased on contract basis for not to exceed $3.00 per ton at the mines in

Pennsylvania, West Virginia and Kentucky. Such coal is vastly superior for gas making purposes to the coal procured by complainant in 1928, and part of 1919, as in those years most of the coal was obtained from Government Pools and was consequently of variable and uncertain quality. "Spot" purchases of gas coal can now be made at prices below those asked for contract coal, but inasmuch as gas coal contracts are nearly always and should be negotiated on or soon after April 1 of any year, it is hardly open to doubt that complainant will be able to contract for the bulk of its gas coal, at the mines, at prices not in excess of those prevailing in 1917. The prices for bituminous gas coal are not in any way affected by the market conditions for anthracite coal. Anthracite is not used and should not be used for producing coal gas.

ARCHIBALD S. B. LITTLE.

Sworn to before me, this 26th day of February, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
the City of New York.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Feb. 28, 1921.

53 *Affidavit of James A. Donnelly.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

James A. Donnelly, being duly sworn, says:

That he is an Assistant Corporation Counsel of the City of New York, and as such appeared herein as counsel to Hon. John P. O'Brien, Corporation Counsel, solicitor for the above named Edward Swann, as District Attorney of the County of New York, State of New York.

Upon information and belief that the Legislature of the State of New York duly convened in the regular session on the 5th day of January, 1921.

Upon information and belief that thereafter and on or about the 24th day of January, 1921, the Governor of the State of New York, who was duly elected at the General Election in November, 1920, sent to the New York State Legislature a message recommending, among other things, that the Public Service Commission of the State of New York be given the power to fix the rates and standards
54 of gas served in this state by all public utilities, regardless of any maximum rates heretofore prescribed by said Legislature.

Upon information and belief that on or about the 16th day of February, 1921 a bill was introduced in both houses of the Legislature, reorganizing the Public Service Commission and giving to said Commission the power to fix rates of all public utilities in accordance with the Governor's said recommendations.

Upon information and belief that a public hearing on said bill has been fixed for March 2, 1921 at the Capitol, Albany, New York.

Upon information and belief that if said bill becomes a law it will repeal all existing rate statutes of the State of New York and will give to the Public Service Commission the power to fix rates for all public utilities.

That the sources of deponent's information and the grounds of his belief for all of the matters stated herein to be upon information and belief are conversations had by him with one or more members of the New York State Legislature, the public press and the files of bills introduced in both houses of said Legislature.

That all of the above defendants duly appealed from the
55 decrees herein within thirty days after the entry of said decrees; that said appeal has been prosecuted with due diligence and that the record on said appeal, consisting approximately of 16,000 printed pages and approximately 1,000 exhibits, will probably be filed in the office of the Clerk of the Supreme Court of the United States within the next three weeks.

I have read the affidavit of Robert A. Carter, in opposition to the defendants' motion for modification of the decree of August 11, 1920, and deny the accuracy of the statement in said affidavit, Section IV, page 9, that "the figures hereinafter set forth show also that at the present time, the cost of making and distributing gas substantially exceeds $1.4882, instead of the $1.20 rate which the defendants asked your Honor to extend indefinitely." Those figures are computed by complainant from records of the operations at its several plants, and do not disclose the fair and reasonable cost of making and distributing gas at the present time.

The consumers of gas in the City of New York should not be required to pay for gas on the basis of the costs reported incurred at obsolete plants and ought not to be penalized because complainant persists in producing carburetted water gas almost exclusively.

In the year 1919, complainant decided to augment its gas production facilities by installing additional water gas units as shown by the testimony before Special Master Gilbert. The reason for such action was not at that time made clear to the Court. The executives of the Company manifestly neglected their duty to the stockholders

and to the gas consuming public by the addition of a plant of this description. They did not inform themselves concerning
56 modern methods of manufacturing gas economically, but watched the growing demands for gas, without making adequate provisions to meet such demands from time to time. This attitude brought complainant to a point where it had either to refuse to meet the increasing demands for gas or else put in a type of plant that could be built and made ready for operation in a few months.

The complainant's executives permitted the Special Master to infer that chamber ovens for the economical and efficient production of gas were something quite new and not yet through the experimental stage. (Opinion of the Hon. Learned Hand, fol. 105). The proceedings of the American Gas Institute show that such gas making equipment has been in successful operation for at least a decade.

The complainant was not organized to make water gas as was said of another company that applied to this Court for relief from the statute, but it was in fact organized to make coal gas and has made and still makes some coal gas. That it does not make sufficient coal gas is nobody's fault but its own.

In testimony introduced by defendants before Special Master Gilbert, it was presupposed that the residual coke from coal gas operations could be sold for $7.00 a short ton (Opinion of Hon.
57 Learned Hand, fol. 101). It developed that the opinion of the witness was too conservative, and the extent to which the conclusions were erroneous was greatly in favor of complainant.

Coke has been sold in New York in large quantities quite recently at $13.5253 to The Brooklyn Union Gas Company, as is shown by the tentative opinion of Special Master Graham in that case (In Equity 16-110).

The said Carter asserts "the present price which the complainant is being charged for anthracite generator coal is $11.57 per ton." It is well known that by-product coke which is different from the coke produced by complainant in its coal gas plants, but which could be made at a chamber oven plant, is worth at least as much per ton as is good anthracite fuel.

These facts not being in dispute, it is evident that complainant could and should have developed its coal gas manufacturing equipment so as to be able to produce gas economically.

Under Section VI of said affidavit, page 9, said Carter refers to the opinion of Circuit Judge, the Hon. Charles M. Hough, in the Kings County Lighting Company case, where it was found that the costs "were at least 96 cents per thousand cubic feet. In answer to that reference, it should be stated that the Kings County Lighting Company's operating costs could not reasonably be compared with those of complainant, for the reasons that said Company operates in a suburban territory, makes only water gas, is poorly equipped to make any kind of gas, loses a large percentage of the gas that it reports it produces, refuses to make and sell all of the gas demanded of it by the citizens residing in the territory that it serves,
58 allows its plant to get into such a condition that it is difficult to operate it, and generally neglects its property and its op-

portunities so that it is beyond comparison with any well designed and efficiently operated public service company.

Said Carter also seeks to compare the operating conditions and costs of complainant, operating what is perhaps the largest gas company in the United States, with those of the New York and Queens Company, and fails to inform the Court that such plant makes only carburetted water gas. Said Carter also refers to the cost per thousand cubic feet of gas sold by the Northern Union Gas Company, a gas utility that actually does not make any gas and has no production plant of its own.

Said Carter in Section VII of his affidavit attempts to deal with "the actual experience and results of the complainant, Consolidated Gas Company, since the $1.20 rate limitation was prescribed by this Court." He sets up against the findings of the Hon. Learned Hand's figures, purporting to show "actual results."

Complainant, therefore, asks this Court to concede the fairness of certain operating cost figures, despite the fact that Judge Hand refused to accept similarly prepared figures when he rendered his opinion in that case. The Court in that opinion took the analysis of the costs at what is known as House A for arriving at the fair cost of producing coal gas and the analysis of costs at House C for reaching the opinion on the cost of producing water gas, both of these houses being located in what is known as the Astoria Works.

Defendants do not concede this was the correct method of
59 arriving at the fair operating costs, but it is certainly unfair for complainant to again ask this Court to make findings on costs which are based upon the operations of obsolete and unnecessary plants which it controls and operates.

It further appears from said affidavit that the sales of gas by complainant are substantially less than heretofore, and this furnishes proof, if proof be needed, that when the price of gas is raised the demand for it decreases. If the rate should be further advanced by complainant, the sales and in consequence also the net revenues would decline still further.

Concerning the statement in the affidavit that the rates of wages paid have gone up and will remain at the present level for an indefinite period, the Court is not informed of the fact that the efficiency of labor has greatly increased to the extent that it has practically doubled since this case was tried before Special Master Gilbert, who commented upon the need at that time of having a foreman for practically every laborer.

The affidavit further speaks of "average rates" paid in January, 1921, but does not state if this is a straight average or a weighted average of the total pay-roll. If the 60.43 cents per hour mentioned is the weighted average of the total payroll, then the rates paid are not in line with those prevailing at other gas works in the New York Metropolitan district, such as, for instance, The Brooklyn
60 Union Gas Company, The New York and Richmond Gas Company, the Bronx Gas and Electric Company, etc.

The affidavit of said Carter stresses the point that everything purchased for the production of gas has gone up, but makes no men-

tion of the fact that as coal went up the coke made therefrom increased in value and offset or may more than offset the increase in the price of coal.

The affidavit in fact is absolutely silent on the present market prices of tar, drip oil and other residuals and by-products resulting from the production of gas and available for sale by complainant.

The Court is not even informed if the gas production cost figures set forth in the affidavit represent the gross or the net, that is, with or without the credits for residuals. The Court has not been apprised of the fact that, with the inconsequential exception of the Central Union Gas Company, none of the companies whose figures on production cost are referred to in the affidavit produced any by-products or recovered any residuals, with the exception, perhaps, of water gas tar.

61 The affidavit of said Carter does not disclose how much coal gas was made by complainant in the year 1920. It does not state if any coke was available for sale or the price at which it was sold. These are some of the more important elements to be considered when arriving at the fair operating cost and the Court has given no indication of the extent to which complainant is operating its coal gas plant or the results of such operation. The real issue before the Court is not what complainant reports as the cost of operation but what would have been the cost in a well designed and moderately well managed gas plant.

In Section XIII under the title "other materials" a gloomy picture is painted of the steadily increasing prices of unspecified "other materials." What are those materials? To what extent do they influence the production cost? The first two items that come to mind, these being perhaps the principal items of so-called cost for "other materials" are 1—water and 2—fire brick.

The City of New York has not raised its rates for Croton water and the water used in the salt water condensers has not been cornered by any profiteers. So far as concerns fire brick which are used in large quantities for repairs to the water gas equipment the closing down of many independent steel mills, the shutting down of bee hive coke ovens and the blowing out of blast furnaces and shutting down of plant used in connection therewith—all of which facts are matters of common knowledge, has resulted in rapid and continued decline in the prices for fire brick.

Under Section XIV "mains and services" the affidavit in support of complainant's motion makes it appear that the manage-
62 ment saved the consumers considerable sums by securing mains and pipes at low prices in bygone years.

It is to be inferred from the affidavit that the prices for mains and services have been "charged into its operating expenses" and an investigation therefore seems to be required to determine to what extent complainant is distributing its capital charges to operating expenses. If the charges referred to relate only to repairs to mains and service pipes said expenses are trivial so far as the instant proceeding is concerned. Complainant takes great credit to itself for obtaining mains and pipes at what it alleges to be favorable prices but gives

the Court no idea of what such prices were or how they compare with those now prevailing.

In connection with the cost of making gas by economical methods in an efficient plant the Court may take judicial notice of the decision handed down by the Maryland Public Service Commission in re Consolidated Gas, Electric Light and Power Company of Baltimore, reported in P. U. R. February 17, 1921, Vol. 1921 A (Advance Sheets No. 4, pp. 577-736) where, on page 643, the Commission reviews some factors entering into the cost of producing gas.

In the above cited case the gas company estimated it would cost in the year 1921 19.01¢ to produce each thousand cubic feet of coke oven gas and also estimated the cost to produce carburated water gas at 59.72¢ per thousand coubic feet. The quality of gas made in Baltimore is not the same as that required to be made by the New York Statute but the above quoted figures show the comparative cost to produce coke oven gas as compared with carburated water gas in the same district by the same company.

The decision of the Commission in the above cited case goes on to show that beyond the holder the distribution costs were estimated by the company at 27.51¢ per thousand cubic feet of gas sold. Said costs beyond the holder are inclusive of distribution, commercial and general expenses, taxes and depreciation allowance—otherwise known as allowance for renewals and replacements—and in fact cover all costs except the return on the investment. As compared with this 27.51¢ per thousand cubic feet of gas for the operating cost beyond the holder complainant asks this Court to accept its figures purporting to be actual results amounting to 41.35¢ per thousand cubic feet. In this connection it need hardly be emphasized that the cost of distributing a cubic foot of gas is the same whether it refers to Baltimore gas or New York City gas.

JAMES A. DONNELLY.

Sworn to before me this 26th day of February, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
The City of New York.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Feb. 28, 1921.

64 *Affidavit of John Holley Clark, Jr.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

John Holley Clark, Jr., being duly sworn, deposes and says, that he is a member of the firm of Hayward & Clark, Special Counsel to the Attorney General herein.

The affidavit of Robert A. Carter, submitted on this application, attempts to give an erroneous impression of the rates now charged by the various companies in the City of New York.

The only companies as to which a rate has been fixed or a limitation placed by this Court are:

Name of company.	Rate per M.
Brooklyn Union Gas Company	$1.10
Flatbush Gas Company	1.10
Newton Gas Company	1.10
Woodhaven Gas Company	1.10
Jamaica Gas Light Company	1.10
Standard Gas Light Company	1.10

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New York Mutual Gas Company	1.10
New Amsterdam Gas Company	1.10
Central Union Gas Company	1.10
Northern Union Gas Company	1.10
East River Gas Company	1.10
Consolidated Gas Company	1.20

In the Bronx Gas and Electric case in the State Court, the rate of $1.50 was fixed on preliminary injunction; but this is a very small company with sales of only 650,000,000 cubic feet per annum.

In three cases on final decree the Courts fixed no rate—namely, the New York and Queens Gas Company, the New York and Richmond Gas Company, and the Kings County Lighting Company.

These are all outlying companies in sparsely settled territory compared with the complainant. Though the territory of each is large, the gross sales of the New York and Queens Company are only 400,000,000 cubic feet per annum, of the New York and Richmond only

630,000,000 cubic feet per annum, and of the Kings County Lighting Company only 1,500,000,000 cubic feet per annum.

Each of these companies has fixed a rate which amounts to $1.50, but such rates are based on the company's own idea of the return it should have and the value of its property. It is true that Judge Hough denied the application of the public officials to have the rate of the Kings County Lighting Company declared inequitable, but as deponent reads his opinion, went only so far as to say that the applicants did not sustain the requisite burden of proof and
66 that the rate fixed would not in his opinion shock the conscience of a decent man. It can hardly be said that in that opinion he fixed the rate as fair at $1.50 per thousand. Nor could he in that case speak with authority as to the proper rate to be charged by the complainant.

That the only recent decisions as to companies nearly approaching the complainant in size or business are the decisions of the Statutory Court as to the Brooklyn Union Gas Company and its subsidiaries. This decision handed down November 26, 1920, stated that those companies could not make or procure and distribute gas to private consumers at less than or close to $1.00 per thousand cubic feet.

This injunction and the rate thereunder were continued for three months by order of the same Court on February 21, 1921.

The Special Master in the Brooklyn Union case in his tentative report dated February 17, 1921, as corrected at a hearing February 24, 1921, finds that for the first ten months of 1920, it cost that company, making all water gas, approximately 85 cents per thousand to make and distribute. The loss for that period he found to be only 3 cents per thousand. There is a reasonable possibility that this loss will be eliminated after further consideration of defendants' claims in the final report.

That since the preliminary injunction in the Brooklyn Union case, there has been an unprecedented fall in the prices of
67 materials used in the manufacture of gas.

The New York American of February 21, 1921, in speaking of the price of crude oil, says as follows:

"Supply and Demand Now Manipulating Petroleum Prices.

Cuts Have Led Oil Men to Believe Their Commodity is Not 'Sui Generis.'

For a long time, while leather, sugar, copper, wheat, cotton and steel prices were crumbling, oil stood up like a sore thumb. Oil men were confident that their commodity was 'sui generis,' so to speak. Consumption, they argued, was so much in excess of production that there was only a slim chance that oil would join the general price debacle which has taken place since last Summer.

But the last month has shown that petroleum products are not immune when stern, old 'supply and demand' gets busy.

All through 1920, 'Pennsylvania' and 'Midcontinent'—two representative grades of crude petroleum—ranged between $5 and $6.10 a barrel, and between $2.75 and $3.50 respectively.

The last fortnight, however, has seen successive cuts, which have brought 'Pennsylvania' down to $1.25 and 'Midcontinent' to $2, even though with each slash the oil trade insisted that that reduction would be the last. It seems, though, that the psychology of falling prices does not regard even oil as sacrosanct. * * *".

The record in the Brooklyn Union case shows that the prices of crude oil and its products, fuel and gas oil, have had phenomenal decreases in the past months, with indications of the drop evident since November. The prices of crude oils, stationary from August to November 24, show the following price changes:

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	Gulf Coast crude	Mid Continent crude
Nov. 24, 1920	3.00	3.50
Dec. 4, 1920	2.50	3.50
Jan. 14, 1921	2.50	3.50
Jan. 22, 1921	2.50	3.50
Jan. 29, 1921	2.00	3.00
Feb. 5, 1921	1.50	2.50
Feb. 11, 1921	1.50	1.75

Fuel oil, testified to be the same as gas oil, has shown a continuous decrease at the Oklahoma refineries since August 1920 (pp. 4711-4721 of the testimony of the Brooklyn Union case) as follows:

Date	Grade (degrees Baumé)	Price (per barrel)
August 20, 1920	24—26	3.50
October 30, 1920	26—28	2.35
December 2, 1920	24—26	2.15
January 26, 1921	"	1.10
February 8, 1921	26 degrees	.80

Decrease in price since August—77%.

Gas oil at the same refineries has similarly gone to pieces, the prices appearing as follows:

Date	Grade (degrees Baumé)	Price (per gallon)
August 21, 1920	32—34	9 cents.
October 30, 1920	32—34	$6\frac{1}{2}$ "
December 2, 1920	32—34	$6\frac{3}{4}$ "
January 22, 1921	32—34	$4\frac{3}{4}$ "
February 8, 1921	32	$2\frac{3}{4}$ "

The last quotation in the Oil and Gas Journal for February 18, 1921, is $2\frac{1}{4}$ cents.

It moreover appears (p. 8015 testimony Brooklyn Union case) that the Tidewater Oil Company on December 29, 1920, made a three months' contract for 21 to 29 degrees Baumé fuel oil at 7.7 cents per gallon delivered in New York Harbor.

69 It moreover appears from the testimony in the Brooklyn Union case that Midcontinent crude oil, suitable for making gas, which can be purchased in Oklahoma today for 4 cents per gallon, can be transported by pipe lines, which are common carriers, to New York for 87 cents per barrel of 42 gallons or 2 cents per gallon or at a total cost of 6 cents per gallon.

Nor does the record close with the falling oil prices. Bituminous steam coal has fallen from a price of $12 per ton at the mines in August to a market price of $2.50 to $3.00, with some sales actually made at $1.50 per ton, the last figure representing a decrease of 87½.

Anthracite steam coal, No. 3 Buckwheat or Barley, which sold at a cost of about $6.50 per ton, delivered in New York in July, has recently been purchased in New York for as little as $3.50 a ton.

The above testimony was introduced in the Brooklyn Union case and also read into the testimony of the Northern Union Gas Company, which is one of the subsidiaries of this company.

Bituminous gas or coking coal, not specifically emphasized in the Brooklyn Union case has similarly fallen. The Coal Age, a recognized authority on coal prices, gives the following prices for Pittsburg screened gas coal, described as one of the high volatile coals.

Date.....	1919 (a)	May, 1920.	Aug. 5, 1920	Jan. 20, 1921.	Feb. 22, 1921.
Price.....	$2.35	$4.50	$12.00	$3.50	$2.50–2.75

70 As to this coal also, the New York Journal of Commerce of February 24, 1921, states under a Youngstown date line:

"The sagging state of industrial operations is best reflected in the fuel markets where record low prices are being maintained. An independent steel interest lately purchased a substantial tonnage of run of mine coking coal at $2 a ton. Three-quarter inch screened gas coal is offered for first half at contract for $3.25 to $3.50."

The only coal which has not shown a marked decrease is the broken coal used for generator fuel. This, however, the Brooklyn Union claimed to be paying only $10.92 in December as against $11.57 in October. It is significant that complainant still claims to be paying the higher sum.

A disinterested coal dealer called in the Brooklyn Union case testified that in his opinion this broken coal would follow other coals in their quick descent. It should not be lost sight of in this connection that the failure of this large anthracite to recede as rapidly as the other coals is not an unmixed evil for the complainant. For the price of coke obtained as a residual from coal gas manufacture depends upon the price of this large anthracite for which it is a substitute. Consequently, with anthracite up and gas coal down, coal gas can be made very cheaply.

Coke was being sold at $12.82 per ton by the Seaboard By-Products Company in December, 1920. Gas coal could be delivered in that

(a) Government price.

month for about $8.00 per ton and the manager of the Seaboard testified in the Brooklyn Union case that he obtained in coke 70% of the coal used.

71 As 70% of $12.82 is $8.97 or about $1.00 more than the cost of the coal which produced it, it can be readily seen how profitable the manufacture of coal gas is at the present time.

I have pointed out above the phenomenal drop in oil prices Mid-continent crude, of which the greatest quantity is produced, has fallen since January 10, 1921 from $3.50 per barrel, at which price it had stood since March, 1920, to $1.75 per barrel today, the lowest price reached since 1915. Gas oil and fuel oil have been going down since August, and on December 15, the very day upon which complainant entered into this absurd 12.30 cent contract with the Standard Oil Company of New Jersey, the Chicago correspondent of the reliable Oil and Gas Journal wrote:

"The eastern market has appeared from reports here through branch offices in the East to be badly demoralized at times. Prices that are lower than are being made in the West are commonly reported. One explanation is that the Western Refineries are anxious to get as much as they can from the car mileage and are by preference shipping on long rather than short hauls. But this hardly explains such prices as $1.30 for fuel oil in New York and 5 cents for 36 gas oil, both of which prices are commonly reported and confirmed."

Nor is this all. Indications of the fall in price of crude oil and its products were evident long before and were noted in oil journals as far back as August 1920. The records of the Geological Survey and of the Bureau of Mines of the Department of the Interior showed from July on, in the summer season which, because of the

72 large use of gasoline, usually taxes the oil capacities of the country, stocks of both crude and refined petroleum were increasing steadily. Indeed the Standard Oil Company of Louisiana, a subsidiary of the Standard Oil Company of New Jersey, in announcing a drop in the price of Gulf Coast Crude on November 23 1920, the first drop in crude oil for more than a year stated

"While there has been no material release from any of the conditions which brought the rise in the price of petroleum products the Standard Oil Co. of Louisiana believes that the process of readjustment now under way in the business world must eventually contribute to lower costs of producing and refining oil.

"Up-to-date there has been no lowering of labor costs for crude oil prices nor recessions in the demand for gasoline. Reductions which have already taken place in many of the principal items entering into the cost of living have for the most part not reached the ultimate consumer, but it is inevitable that before long lower prices will be brought about by new quotations now prevailing in primary markets.

"The Standard Oil Co. of Louisiana believes that this movement toward a restoration of what was properly considered normal prices should be aided by the oil industry."

Similarly "an official of the Sinclair Company, an important man" is quoted in the Oil Trade Journal for December as Follows:

"Sinclair Official Says Restrict Drilling.—Another official of the Sinclair Co., an important man, in discussing the local and temporary conditions in the Mid-Continent with the writer a few days ago, presented the other side, that is the temporary side, of the general question. Said he:

"The situation in the Mid-Continent is this. The producers must restrict drilling immediately, or else they are likely to precipitate a break in prices. Our company will not cut the price. Of that I can assure you positively. But on the other hand we are not going to buy oil to put in storage now. We would find it hard to get the money, then it would not be good business to begin storing much oil in the face of a possibly declining market. There is more oil in the Mid-Continent fields right now than the pipe lines can readily handle. They have been storing some oil, as a matter of temporary expediency. Our own storage has increased about
73 one million barrels. But there will be little more oil stored, if any, during this year. Times are too hard, and too uncertain. Consequently, if the producers do not restrict drilling, they may soon create a situation which will result in the crude market becoming demoralized. Such a condition would probably be temporary, it is true, but might last for several months if it should come."

All of these signs were known to complainant or should have been known and still it entered into a contract for gas oil at 12.30 cents per gallon on December 15, 1920.

There can be only two explanations for this remarkable procedure, either

(1) The contract is not made in good faith but for the purposes of this case with the expectation that when the light of judicial scrutiny is turned away the price will be adjusted and the contract modified as similar contracts were modified in 1914 and 1919.

or (2) The Standard Oil Company is in a position to maintain its price regardless of market conditions and complainant has so conducted itself by relying so exclusively on water gas manufacture that it is now forced to pay whatever the Standard sees fit to charge.

The first alternative may or may not be true but it seems that the second is true to such an extent that the regulation of the rates for gas in this city now depends not on the legislature nor on the Public Service Commission, nor on the Courts but on the whim of the Standard Oil Company.

I have attached hereto extracts from the reports of the Federal Trade Commission made in 1917 and 1920 as to the position of the Standard Oil Companies in the Oil industry and their ability
74 to fix and maintain prices.

As to the immediate situation in New York it appeared in the Brooklyn Union case that the freight rate on petroleum and its

products was from 5½ cents to 6 cents per gallon from Oklahoma and Kansas. The pipe line rates, on the other hand, are only two cents per gallon. The Standard Companies and the Tidewater Oil Company, in which Standard interests hold 11% of the stock, have the only refineries in or about New York harbor. The same interests own or control the pipe lines to New York, consequently, the Standard Companies have an advantage of from 3½ to 4 cents per gallon over the other companies operating in this territory. With such a margin and with such potentialities for destroying any competitor who presumes to cut prices materially on large quantities; of course the Standard Companies fix the prices in this territory. Within a week the Standard of New York made a contract with the Brooklyn Union and the Standard of New Jersey made a contract with the complainant for gas oil at the same absurd price of 12.50 cents per gallon.

Perhaps complainant will be forced to pay this price. But it knew or should have known that it was at the mercy of the Standard. It knew or should have known that it could be squeezed at any time. Should the people bear the burden of its failure to provide facilities for making gas by an alternative method which would have defeated this present exhaustion conditions?

If complainant is allowed to increase its price for gas 1 cents each time the Standard puts up the price of oil 1 cent there will
75 soon come a time when gas will be out of reach of the citizens of New York and the complainant with its consumers will equally suffer.

The conditions above out-lined as to the position of the Standard Companies in this territory and the possibility of those companies fixing an unreasonable price for the oil used in making gas is not a new one.

Thomas E. Rowland, testifying before the Senate committee in 1884 stated that the water gas plants were first installed in 1880. On cross-examination he testified as follows:

"Q. And since that took place the old benches have been practically abandoned?

A. Yes, sir, excepting for their moral worth——

(Senator Robinson.)

Q. What do you mean by the moral worth of these benches?

A. It is not well, perhaps, to use that word; I will withdraw the word "moral", the naptha which is used by the New York gas light company is sold by one large corporation, and only one; if the New York gas light companies were kept in a condition whereby a small expenditure would enable them to sell either coal or water gas, as they elected, the moral effect upon the Standard Oil Company, it would be a check upon them."

Also Mr. Wood of the complainant company showed on the stand in the present case that this same possibility of the high price of oil was one of the potent factors which caused the complainant to

inaugurate the system of having both coal and water gas at Astoria. He stated p. 5063:

76 "Q. Is it not a fact that you started an all coal-gas proposition over there in 1905 because you wanted to get away from this high price of oil?

A. We wanted to combine water-gas and coal-gas plant, as we could take advantage of both conditions.

Q. It was an idea of keeping an anchor to windward, was it not?

A. Absolutely, it was——

Mr. Ranson: Let him finish the answer.

The Master: Yes.

The Witness: So that to a certain extent with the change in the price of oil and the change in the price of coal, we to a certain extent could take advantage of those changes, and operate under the most favorable conditions for the company and for the consumer. It was with the idea it would be of benefit to the company by having a certain amount of coal gas installation."

Certainly complainant should not be allowed to come in today and claim that after forty years of warning, they are not ready to meet abnormal prices of gas oil fixed by the Standard Oil of New Jersey. If it was good business in 1880 to keep the coal gas plants in such condition that they would have a "moral" value as against the possible extortions of the Standard Oil Co., it was certainly wisdom on the part of this company to have provided itself with a sufficient capacity of coal gas to be able to turn to that method in case of any emergency such as the present.

Instead of that we find that this company, far from having a reasonably adequate equipment for the making of coal-gas, has so built up and extended its system that today it has effective coal-gas capacity of only 23,800,000 cubic feet per day as against a water gas capacity of 172,500,000 cubic feet per day. Certainly the gas consumers of this city should not be charged with this long failure of the complainant to take reasonable precautions to see to it that it would be in a position to manufacture gas by the most reasonable and the cheapest method no matter what course the Standard Oil Companies pursued.

JOHN HOLLEY CLARK, JR.

Sworn to before me this 26th day of February, 1921.

HARRY HERZOFF,
Commissioner of Deeds,
City of New York.

78 *Extract from Report of the Federal Trade Commission on the Price of Gasoline in* 1915.

Published by the Government Printing Office.

1917.

P. 8. Position of the Standard Companies in the Industry.

In using the terms "Standard" and "other" as applied to various refining companies, the Commission is adopting a generally accepted usage. An examination of the lists of stockholders of the various companies called "Standard" shows that they are owned by bodies of stockholders which are so similar in membership as to justify the common usage. This common ownership is in accord with the decree which dissolved the Standard Oil Co. of New Jersey in 1911. Throughout this report, though the several Standard companies are often treated as a group, this is not to be taken as obscuring the fact that they maintain separate organizations, including officers, directors, and refining and marketing machinery.

The figures presented in this report indicating the percentage of total production and stocks of crude oil and refined products of the Standard companies, are considered conservative, for the reason that several important companies are classed as "independent" though considerable parts of their stock are owned by stockholders in Standard companies.

(9) Throughout the year 1915 the pipe lines and producing companies allied with or controlled by the several Standard companies held in their possession approximately 65 per cent of the total quantity of crude oil held by pipe lines and producers east of the Rockies and their control increased to about 70 per cent in the latter part of the year. As already stated, they held from 71 to 81 per cent of the crude oil held by refineries during 1915.

(10) The refineries owned by what are clearly Standard companies produced over 60 per cent of the gasoline products produced in the United States during 1915 by refiners reporting to the Commission, which refiners embrace all the more important concerns in the United States; and these same refineries sold about 65 per cent of the total quantity of gasoline marketed, while their exports were approximately 83 per cent of the total exports in 1915. In August, 1915, the various Standard companies, refiners and jobbers, held 79 per cent of the stocks of gasoline, and in December 1915, 76 per cent. As several large refining companies in which stockholders in Standard companies have considerable holdings have been classed as "independent," the percentages given are conservative.

(11) The several Standard companies have the power through their purchases and sales to exercise considerable control over the price both for crude oil and the products thereof. (*a*) The quotations, or "posted prices," announced by Standard concerns constitute

(with rare exceptions) the "market" for crude oil in the Appalachian and Mid-Continent oil fields. Statements made to the Commission show that large buyers for "independent" oil companies, such as the Gulf Refining Co., follow the Prairie Oil & Gas Co. prices in Oklahoma. (*b*) The various Standard companies, with relatively unimportant exceptions, in announcing their tank-wagon price of gasoline in any locality, practically fix the price that prevails. As a rule, and throughout most of the country, the prices announced by Standard concerns as the ones at which they will sell their products are carefully watched and are followed more or less closely by the so-called independents. (See p. 155*f*.)

The prices of gasoline in 1915 showed such inequalities and such divergent rates of increase in different sections of the country as to be incapable of explanation merely upon the basis of different costs of production and transportation or of local peculiarities of supply and demand. (See pp. 57*f*, 83, 89, 113, 119.) As no other agency apparently possessed sufficient power to produce such results, the conclusion seems justified that the division of the country into Standard marketing territories and the absence of effective competition in the sale of gasoline among these territories, were partly responsible for the inequalities.

The foregoing statements concern the general situation, and do not overlook the fact that in some localities similar inequalities or discrimination, on the part of the so-called independent companies have existed. (See p. 118.)

Division of Territory and Competition.

(12) The investigation establishes the fact that the several Standard companies have with respect to gasoline maintained a complete division of territory embracing the whole country and that almost without exception each Standard marketing company occupies and supplies a distinct and arbitrarily bounded territory. The map which accompanies this report (see p. 22) shows that the entire country is divided among various Standard companies and companies affiliated with them, and with one or two negligible exceptions, the territory occupied by one does not overlap with that occupied by another. Thus, the Standard Oil Co. of New York exclusively occupies the New England States and New York, but no other State; the Atlantic Refining Co. exactly occupies Pennsylvania and Delaware, but no other State; the Standard Oil Co. (Indiana) exclusively occupies a compact group of 10 North Central States, with a few counties in northern Oklahoma; and similar conditions obtain throughout most of the United States.

That these territories are properly characterized as "arbitrarily bounded" is clear from the fact that their boundaries generally coincide with State lines. State lines are political boundaries and seldom correspond to the areas that would be fixed by industrial conditions and economy in marketing. Thus, if a refinery at Parkersburg, W. Va., could most conveniently and cheaply supply points in southern Ohio or one on New York Harbor could better supply

points in northeastern Pennsylvania there appear to be no economic reasons why southern Ohio should not be embraced in the same territory with West Virginia points and northeastern Pennsylvania with New York points. The inclusion of Lewiston, Idaho, in Continental Oil Co. territory rather than in California territory, illustrates the same point; and this case has caused considerable complaint. (See p. 118.) Almost without exception, however, the Standard territories are rigidly coterminous with State boundaries sometimes regardless of freight rates or other factors which would normally determine the cheapest source of supply.

The only exceptions to the situation just described that have been found are in Arkansas and Oklahoma. In the former State both the Standard Oil Co. of Louisiana and the Magnolia Petroleum Co. have tank-wagon stations and in Oklahoma both the Standard Oil Co. (Indiana) and the Magnolia company have stations. These few exceptions, however, have little significance. The case of overlapping territories in Arkansas is of some interest as indicating that the several Standard companies might interpenetrate and still do a profitable business.

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To some extent the different rules of law obtaining in different States make it advantageous to recognize State lines in organizing a business. This fact, however, does not explain why any state should be in one Standard marketing territory rather than in another; nor does it prevent two or more companies from operating in the same territory.

None of the so called "independent" companies have marketing territories limited as are the Standard marketing territories. Such big "independents" as The Texas Co., Gulf Refining Co., Indian Refining Co., National Refining Co., Cudahy Refining Co., and Pure Oil Co. all do business in more than one of the Standard marketing territories, and find it possible to make profits while competing with one another and with the several Standard companies. The Texas Co.'s domestic gasoline business is scattered irregularly over 32 States and the District of Columbia and 10 Standard marketing territories. The Gulf Refining Co.'s business is similar, though not scattered over quite so wide an area. The Indian Refining Co. markets gasoline in at least 22 States all through the Middle West and eastern half of the country. According to the Commission's information, the National Refining Co., sells gasoline in 15 states and 5 different Standard territories. It follows that the Standard territories as now limited and bounded are not required for the conduct of a profitable business.

(13) In so far as gasoline is concerned—and it is now the chief refined product of crude-oil, little, if any, competition exists among the several Standard companies. Considerable shipments of gasoline are made by the various Standard companies into the territories of other Standard concerns, but such shipments are generally made to the other Standard companies, for sale by them as their own product, and not in competition with them.

(14) In each of the territories occupied by the various Standard companies, however, more or less competition is offered by the so-called independents. Such competition is especially noticeable in a large part of the North Central states, where Oklahoma-Kansas refiners and jobbers supplied by them, have competed keenly with the Standard of Indiana (see p. 122); and along the Atlantic and Gulf coasts, where The Texas Co. and the Gulf Refining Co. have made inroads on the Standard's business, even as far north as Maine. The Shell Co. of California—controlled by foreign interests—appears to be one of the most important competitors of the Standard Oil Co. (of California) on the Pacific Coast, though not in the Rocky Mountain States.

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As already stated, the various Standard companies together in 1915 manufactured over 60 per cent of the gasoline products produced by United States refiners reporting to the Commission; and their sales equaled about 65 per cent of sales by refiners reporting to the Commission. Naturally these percentages differed in different states (see p. 144). In parts of the Indiana company's territory the "independents" marketed 50 per cent. of the gasoline. In New England states, however, the Standard Oil Co. of New York had about 70 per cent of the sales.

Résumé.

To recapitulate, the investigation of the petroleum industry by the Commission shows that a decreasing supply of light crudes, coupled with increasing foreign and domestic demands, explains a part of the advance in gasoline prices during 1915, but that part of the advance in certain sections, at least, was unnecessary and to a certain extent due to artificial conditions already pointed out. First during 1915 unusually large stocks of crude, bought at low prices, were accumulated thus withholding great quantities from the market (see pp. 46, 48) and tending to advance prices of crude oil. Second, not only was the advance in gasoline prices greater than was required by the advance in cost, but also the prices were advanced with inequalities as between and coinciding with the territories occupied by the various Standard companies.

In the judgment of the Commission, the absence of substantial competition among the various Standard companies, coupled with the large proportion of the business they hold, was an appreciable factor in causing this situation.

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Remedies.

The Commission has carefully considered the possibility of relief from the situation indicated in this report. As already stated, a part of the advance in gasoline prices during the latter part of 1915 was a result of the operation of increasing demand for gasoline and decreased production of light crude oil. For this natural advance in price certain obvious remedies lie in the direction of economy in production and use of petroleum and its products. Numerous wastes

can be avoided; improved methods can be used in refining which will give greater yields of gasoline products; motors and carburetors can be adapted to use cheaper fuels, etc. Though the supply of crude oil is to be regarded on a limited natural resource which one day will be exhausted and which, therefore, must ultimately decrease in quantity, some relief can be hoped for by not wasting that resource.

In connection with the advances in gasoline prices in 1915, attention has already been called to the imperfections in the competition existing in the industry, which imperfections are due to several causes.

First is the fact that a single group of refiners have to a large extent a community of interest based on common stock holding. They produce and sell so large a proportion of the product, gasoline, that they can and do make the generally prevailing market price and are generally followed by the others. Moreover, this same community of interest embraces oil producing and transporting companies (pipe lines) to such an extent that it has had an advantage over smaller competitors in that pipe lines have not been made available to its competitors on the basis of reasonable rates and conditions of service. This advantage as to pipe lines holds true of a few large independent concerns. Under such circumstances, competition can hardly be expected to work effectively and fairly or to adjust prices to costs with any reasonable precision.

Second, the absence of accurate statistics of production, stocks and sales of crude oil and the chief refined products make the
84 working of competition imperfect. The only statistics of crude oil currently available are the uncertain and sometimes conflicting figures printed in trade journals; while statistics of the production of gasoline and other refined products are practically nonexistent for current purposes. Even the export statistics are unsatisfactory. The crude-oil industry is a peculiarly speculative one at best and its vicissitudes affect the refining business. With such imperfect knowledge of conditions the refiners with small resources are especially handicapped. If there is to be a reasonable adjustment between demand and supply, there must be a knowledge of demand and supply conditions.

The remedies for artificial or unnecessary elements in the advance of gasoline prices suggested by the foregoing statement of causes are:

1. To prevent the control of the market from being exercised through common ownership, five courses of possible action are suggested:

a. Possible action by the Department of Justice in view of the facts disclosed by the Commission's investigation.

b. An Act of Congress providing, when conditions require, for the reopening of antitrust cases on the application of the Attorney General by a bill of review (see p. 163).

c. Abolition, by legislation, in certain cases, of commonstock ownership in corporations which have been members of a combination dissolved under the Sherman law.

d. Effective limitation upon common ownership of stock in potentially competitive corporations by withdrawing the power of voting and control.

e. Legislation which while recognizing common ownership, would fix upon such common owners the responsibility for the acts of each of the several companies so owned, which are preventing competition.

2. In the opinion of this Commission, it would in the long run be the simplest and most effective policy to segregate the ownership of the pipe lines from the other branches of the petroleum industry. This would mean that no controlling portion of the stock of any pipe line company engaged in interstate commerce should be owned by individuals, companies or corporations that are also interested as owners in any oil-producing or refining properties and vice-versa.

3. In view of the bearing of accurate statistics upon industry and competitive conditions, it is suggested that the appropriate branch of Federal Government should be provided with adequate means for carrying on the statistical work required.

4. It is suggested, in view of the variation in the product now sold as gasoline, that only such petroleum products as contain a certain proportion of reasonably volatile elements shall be sold in interstate commerce as "gasoline."

WILLIAM J. HARRIS,
Chairman.
JOSEPH E. DAVIES,
WILLIAM B. COLVER,
JOHN F. FORT.

(Commissioner Will H. Parry being ill when the final draft of the report was passed upon by the Commission, it could not be submitted to him.)

P. 22. Another complicating circumstance lay in the character of the business organization obtaining in the petroleum industry. Likely to touch upon those aspects of the situation that may have directly affected gasoline prices, it is to be observed that in some sections of the country the former subsidiaries of the Standard Oil Co. (New Jersey) were decidedly dominant, while in others their position was not so strong; and that almost without exception these Standard companies limited the fields of their chief operations by pipe lines—much the same as before the dissolution—and did not invade one another's territories in the marketing of gasoline.

This territorial division is so important and will be referred to so frequently that it should be described at once. The map facing this page shows a complete division of the country into 11 distinct market-territories. The 11 companies which do the tank-wagon market-

ing of gasoline (and kerosene) for Standard refiners in these territories are as follows:

(1) Standard Oil Co. of New York (in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York).

(2) Atlantic Refining Co. (in Pennsylvania and Delaware).

86 (3) Standard Oil Co. (New Jersey) (in New Jersey, Maryland, Virginia, West Virginia, North and South Carolina and the District of Columbia.

(4) Standard Oil Co. of Ohio (in Ohio).

(5) Standard Oil Co. (Indiana) (in Michigan, Indiana, Illinois, Wisconsin, Minnesota, North and South Dakota, Iowa, Missouri, Kansas and the northern part of Oklahoma).

(6) Standard Oil Co. (Nebraska) (in Nebraska).

(7) Standard Oil Co. (Kentucky) (in Kentucky, Mississippi, Alabama, Georgia and Florida).

(8) Standard Oil Co. of Louisiana (in Louisiana, Arkansas and Tennessee).

(9) Magnolia Petroleum Co. (in Texas, Oklahoma and Arkansas).

(10) Continental Oil Co. (in Montana, Idaho, Wyoming, Colorado, Utah and New Mexico).

(11) Standard Oil Co. (California) (in Washington, Oregon, California, Arizona and Nevada).

Hereafter these companies will be referred to as "Standard of New York," "Standard of California," etc., and their territories will be designated as "New York territory," "California territory," etc.

In only two cases do these territories overlap, namely in Oklahoma and in Arkansas. In the former case the Standard of Indiana supplies a few points in Northern Oklahoma, a state in which the Magnolia Petroleum Co. is the chief Standard marketing company; while in Arkansas the Magnolia Petroleum Co. and the Standard of Louisiana both do business. In 1915, however, these two companies both sold gasoline at only 6 out of 25 towns having a population of 2,500 or over, according to the census, p. 143.

Position of the Standard Companies in the Industry.

In the preceding chapters it has been shown that the advance in gasoline prices during 1915 exceeded the increase in the cost of production and cannot be entirely explained by increased cost or by the condition of supply and demand. It was in part the result of excited market conditions which affected prices of both
87 crude oil and refined products. The existence of inequalities in the advances in prices in the various Standard marketing

territories has been shown and in the present chapter the position of the several Standard companies in the industry will be stated for the purpose of showing the relation of the absence of competition among these companies to the price situation. Section 1.—Dominant position of the Standard companies in their several marketing territories.

The fundamental condition which militates against the effective working of competition in the petroleum industry is the fact that the country is arbitrarily divided into 11 separate gasoline markets (see p. 22) corresponding to the 11 marketing territories of the several Standard companies, in at least 9 of which the particular Standard company concerned is the dominant factor. On the basis of the tank-wagon sales in towns having a population of 2,500 or over, estimates have been made of the relative volume of the sales of gasoline by the several standard companies in their respective territories. As these estimates are based upon only a part of the total business and as the Commission is not in possession of complete statistics of the so-called independents, the estimates must be taken with allowance for a small margin of error. The figures, however are believed to be approximately the correct percentages and indicate fairly accurately the comparative position of the several Standard companies in their respective territories. They show that the Standard companies control approximately 65 per cent. of the gasoline business throughout the U. S. Although their percentage of control has declined since 1906, when testimony taken in the Standard Oil case showed them to possess approximately 85 per cent of the business, nevertheless they still occupy a dominant position in the trade and the aggregate volume of their business has increased. Moreover, a material part of the apparent decline in percentage of control by Standard companies is due to the fact that certain large companies, in which various Standard stockholders have considerable interests are classed as "independents" in this report. Standard stockholders owned about 30 per cent of the stock of the Tidewater Oil Co. and about 25 per cent. of the stock of the Texas Co., which are here classed as "independent." Another company included as among the independents in 1915 is the Midwest Refining Co., although it is known to have operated in such a way as to have made it an ally rather than a competitor (see pp. 8, 14) and is now reported to have come under the direct control of the Imperial Oil Co. Ltd. of Canada, which is a Standard concern. These facts indicate that the statement that Standard companies controlled approximately 65% of the gasoline business of the U. S. is conservative. It does not mean that all the remaining 35% of the business was strictly competitive.

TABLE 37.

Estimated Percentages of the Total Quantity of Gasoline Sold in the Several Standard Marketing Territories by the Several Standard Companies Operating Therein During 1915.

Territory of	Per cent of total sales of gasoline.	Territory.	Per cent total sales
Standard of New York...	70	Standard of Indiana...	60
Atlantic Refining Co.....	70	Standard of Kentucky..	50
Standard of Ohio.....	70	Standard of California..	48
Continental Oil Co.....	63	Standard of Louisiana..	33
Standard of New Jersey...	60	Magnolia Petroleum Co.	27
Standard of Nebraska....	60		

At a hearing held by the Commission on June 12 and 13, 1917, representatives of the Standard Oil Co. of New York stated that 70% was approximately correct for their territory to the best of their knowledge. Representatives of the Standard of Ohio also stated that, according to oil-inspection records in Ohio, their company sold about 65% of the gasoline in that State, which figure is only a little less than the Commission's estimate. The Indiana percentage, it should be observed, applies to the whole territory, but in some states—as in Kansas and Iowa—the percentage was somewhat lower. Indeed, the Indiana company's volume of sales for Kansas, computed on the basis of tank-wagon sales at towns of 2,500 or over, was only 46 per cent in 1915.

Section 2. Community of Interest Through Common-stock Ownership.

Moreover, the stockholders of all of these companies are to a large extent the same individuals or interests. This community of interest includes the marketing, refining, oil-producing and pipe-line properties. The Commission, in the course of its general investigation of the oil industry, has secured from the several Standard companies lists of their stockholders as of January, 1915. A
89 study of these lists shows that, although some changes have taken place in the ownership of these companies since the dissolution, a majority of the stock of each is held by a small group composed of the same individuals, trustees or corporations. For example, when those who held 300 shares or over in the Atlantic Refining Co. are taken as a basis, it is found that they held 55% of this company's stock, 55% of the stock of the Standard of Indiana, 53% of the stock of the Standard of Ohio, 53% of the Standard of Kentucky, 54% of the Standard of New Jersey, 53% of the Standard of New York, 53% of the Standard of Nebraska, 52% of the Continental Oil Co., 55% of the Prairie Oil & Gas Co., and

% of the Prairie Pipe Line Co. If the holdings under 300 shares are considered, the percentage of common holding would run to approximately 70%. It is known that Messrs. Archbold and Folgar own approximately 70% of the stock of the Magnolia Petroleum Co. The Standard of New Jersey owns practically all of the stock of the Standard of Louisiana and of the Carter Oil Co. That there is a community of interest with large oil-producing properties is clear.

P. 146:

Section 3. Effect of Community of Interest on Competition.

The community of interest described in the preceding section affects the oil industry in two chief ways: (1) It establishes a relationship, based on common stock ownership, between the companies engaged in the different stages of the industry; production of crude oil, pipeline and tank-car transportation, refining, and marketing. This may be called industry-combination or integration. 2. It brings together in common ownership potentially competitive companies, engaged in the manufacture and sale of finished petroleum products, such as gasoline and kerosene.

P. 148:

Division of Territory Among Non-competing Refining and Marketing Companies.*

It has been urged upon the Commission that the several Standard companies constitute separate business units, most of which do not own oil-producing properties or pipe lines and that in any case no one of them is large enough to dominate the markets of the country. This argument, however, appears to be largely, if not wholly, vitiated by the fact of the common ownership of the stocks of the several companies and by the division of the country into separate marketing territories among which there is no effective competition in gasoline.

It was recognized by those in control of the Standard companies that business units having a common ownership are not likely to compete. In the brief for the appellants, reported in the case of the Standard Oil Co. v. United States (221 U. S. 8) which led to the dissolution of the Trust in 1911, it was argued as follows:

"Because of the common ownership of the different properties in interest, they were not independent or competitive but they were the constituent elements of a single business organism. * * * There is no warrant for the assumption that corporations engaged in the same business are naturally or potentially competitive regardless of their origin or ownership." It is apparently as a result of the maintenance of a large degree of common ownership, therefore, that

since the dissolution no substantial competition has arisen among the Standard companies.

Certain Standard companies sold gas and fuel oils, lubricating oils and even kerosene to some extent, in the territories of other Standard companies, but the value of such sales, except for lubricating oils, was generally insignificant. So far as Standard companies were concerned, there was practically no competition in gasoline. It may be urged that the overlapping of territory of the Magnolia and Louisiana companies shows their readiness to compete. The extent of the competition, however, is too small to be significant (see p. 231), and merely tends to confirm the opinion that one Standard company might find it profitable to invade the territory of another—a proceeding the economic advantage of which was denied at the hearings held by the Commission on June 12 and 13, 1916.

Section 5. The Power of Standard Companies to Make Prices—Testimony of Competitors.

When it is stated that the several Standard companies generally make the market on gasoline in their territories, it is meant that the price which a Standard company adopts for the sale of its products usually becomes the prevailing price in the territory which it occupies. This is true because, with one or two exceptions, in each territory the particular Standard company sells so large a part of the gasoline (so very much larger than any one of its com-
91 petitors can sell) that its competitors cannot be expected to depart very long from the price it adopts.

P. 158:

Section 6. Territorial Division and the Dissolution Decree.

As was observed on page 5 of this report, common ownership of the several companies was not prohibited by the decree of dissolution. It was specifically provided in the decree as follows:

"But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination."

Thus shares in each of the subsidiary companies were given to each of the shareholders of the Standard of New Jersey, and the combination ceased to be a combination in the form of a holding company.

But it did in fact, if not in law, remain a combination—one that may be called a community of interest. Certainly the majority of the companies have a majority of their stock held by a relatively small number of individuals and allied interests; the territories as established have been carefully maintained. It will be remembered that the Supreme Court stated as one evidence of intent to monopolize "the system of marketing which was adopted by which the com-

try was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded."

It is not the purpose of the foregoing paragraphs either to criticise the dissolution decree or to accuse the Standard companies severally or collectively of violating that decree. The decree may be regarded as an experiment. The companies concerned claim to have strictly followed the letter of the decree, and have ever acted upon advice of counsel. Aside from technical questions concerning the means, however, it is the Commission's judgment that in the oil industry that experiment of dissolving corporations without separating owners has not achieved the purpose of establishing effective competition.

92 *Report of the Federal Trade Commission in Response to House Resolution No. 501 on the Advance in Price of Petroleum Products.*

Published by Government Printing Office, 1920.

P. 31:

The Standard oil companies alone, taking only those which are generally recognized as such (excluding, e. g. the Tide Water Oil Co. in which a Standard company has a 41% interest) had a total production of 69,529,000 barrels in 1919, or about 18% of the total marketed production of the United States. Excluding the California field their production for the fields east of California amounted to about 16% of the total marketed production from those fields.

P. 32:

As a rule the small refiner has little if any production of crude oil and any advance in the price of crude oil means an additional handicap to him. The companies combining a considerable proportion of production with refining have an advantage by reason of an advance in the price of crude oil on that part of the crude oil which they produce. Being engaged simultaneously in the producing and refining of crude oil makes it possible for the integrated companies, therefore, to become to greater or less extent the beneficiaries of the advances in the price of crude oil, both as producers and as refiners while those small refiners who do not have crude oil production complain that they are placed in a difficult position.

The prices for crude oil for the bulk of the production in each field are, as already stated, the prices announced and posted by the large crude oil marketing companies or refiners which purchase the oil. Generally, a Standard purchasing company takes the initiative in posting the price and the other large purchasing companies generally follow its lead. Thus, in the Mid-Continent field the Prairie Oil & Gas Co., generally makes the price, though sometimes it is the Sinclair Oil & Gas Co. or some other large purchaser. The large companies in this field say that they say this price to all producers without discrimination, and that this is indeed necessary for them

as a matter of business policy. The small companies, on the
93 other hand, often pay premiums, partly to get oil from particular pools of superior quality and partly because the producers generally prefer to sell to the large purchasing companies unless some extra price inducement is offered to them.

In the Appalachian field the South Penn. Oil Co., a Standard concern purchases most of the oil and makes the posted price. For instance, in the recent rapid advance in the price of Pennsylvania crude the small refiners kept offering such large premiums to get the oil that the South Penn Oil Co. was induced to repeatedly advance its posted price until it reached $6.10 per barrel, the highest point it has ever reached since pipe lines were built in that territory.

The Standard purchasing companies have always been the largest buyers, and the Standard group as a whole is not such a large crude oil producer in comparison with its requirements of crude oil as some of the more important independent oil companies. This fact and the magnitude of the operations of the Standard group have tended to give to it, as a rule, the initiative in posting prices. When oil is relatively scarce the small purchasers offer higher premiums than usual to get it and this often leads the large purchasing companies to advance their prices as in the instance cited above in the Pennsylvania field. On the other hand when there is a glut of oil and stocks are piling up the small purchasers have been often able to get all the oil they needed at a discount.

P. 52:

Before the Standard oil combination was dissolved in 1911 the whole area of the United States had been divided up between its 11 marketing companies and each one operated almost exclusively in its assigned field for those products, especially gasoline and kerosene, which are generally handled in bulk. After the dissolution the existing marketing arrangements by which there was this division of territory remained undisturbed and the majority of the capital stock of these companies remained in the hands of a comparatively few identical stockholders. In its report on the price of gasoline published in 1917, this commission described the marketing situation as follows:

(Here is quoted (pp. 6-7 to 13) of that report as it appears above.)

94 The commission is advised by various persons conversant with the marketing branch of the oil trade that there has been no considerable change in respect to the marketing territories of the Standard companies. In a few instances some departure from the former situation has occurred as, for example, the recent invasion of certain districts in Rhode Island and Connecticut by the Atlantic Refining Co. The larger independents, however, have extended somewhat the scope of their operations, while important new independent companies have developed and become a factor in the wholesale distribution of gasoline and kerosene.

As shown in the commission's report on the price of gasoline, already referred to, the Standard companies at that time generally took the lead in making advances or reductions in prices in any

particular locality and the other companies generally followed by making the same price. That report also noted that a somewhat more independent policy was pursued by a few of the larger independent companies such as the Texas Co. and the Gulf Co. (see pp. 156-157). This seems to be also the case today.

The price advance recently made for gasoline in Washington (May 5) was initiated by the Texas Co.

Price initiative today seems to be left generally to the Standard companies and competition is apparently more directed to developing facilities for getting business than to seeking to obtain it by underselling.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Feb. 28, 1921.

95 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
CHARLES D. NEWTON, as Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, as District Attorney of the County of New York, Defendants.

Opinion of Learned Hand, D. J., Modifying Decree Filed February 28, 1921.

Filed February 28, 1921.

95½ United States District Court, Southern District of New York.

In Equity.

No. 15—358.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
CHARLES D. NEWTON, as Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

Opinion Denying the Defendants' Motion.

Motion by the Defendants to Modify the Decrees Entered Herein on August 4, 1920, and August 11, 1920, so as to Continue and Extend Indefinitely from March 1, 1921, the Limitation Put Upon the Complainant's Rates by Those Decrees.

96 John P. O'Brien, Corporation Counsel of the City of New York, and James P. Donnelly, Assistant Corporation Counsel, for the defendant Swann, in support of the defendants' motion.

William Hayward, Special Counsel for the defendant Public Service Commission, for the motion.

John Holley Clark, Jr. (Wilber W. Chambers, Solicitor), for the defendant Newton, for the motion.

William L. Ransom, Charles A. Vilas, and Jacob H. Goetz (Shearman & Sterling, Solicitors), for the complainant Gas Company, in opposition to the motion.

LEARNED HAND, *D. J.*:

In the decrees entered herein on August fourth and August eleventh, 1920, I provided that until March one, 1921, the complainant should be limited to $1.20 in the price it might charge for gas, and that if before that time a rate should be fixed by competent public authority, the Master should distribute the sum deposited in Court above eighty cents as though that rate had been in force from the date of the decree, but if no rate had been promulgated that he should turn over the sums impounded to the plaintiff. That period has now expired and the Legislature of New York has not yet given power to any public authority to fix a rate in excess of eighty cents, and of course no such rate has been fixed. The defendants, therefore, apply for an extension of the period either in-
97 definitely or to some stated time, the limit to remain as before, and the provision for distribution in accordance with the new rate to be retained. The plaintiff answers by insisting that the cost of manufacture and distribution have greatly increased in seven months' time and that if any limit is to be fixed it must be much in excess of one dollar and twenty cents.

Although the State has not yet taken any final action, its authorities have not been idle, for there is pending in the Legislature, acting on the recommendation of the Governor, a bill which as presented gives the public service commission power to fix a rate regardless of existing statutes, and as printed, summarily to establish a temporary rate which shall supersede existing rates for a period in the aggregate of not over nine months. It is clear that unless changed the commission would under this bill have power at once to deal with the situation here arising. The plaintiff suggests that the provisions for temporary rates in advance of full hearing might be unconstitutional, but if so conceivably this possible defect may be remedied by amending the bill; at least I may not assume that this will not be done. For example, when enacted, it may provide that the temporary rate, if a reduction, should merely authorize the commission to impound the difference and make an eventual award in accordance with more deliberate findings. Indeed, such may be the correct interpretation of the commission's powers as the bill stands. As section seventy-two reads at present, the commission will certainly have power to impound some of the moneys collected for certain purposes which it may order the companies to realize.

98 As regards this proposed legislation, the assertion was made in argument that the Public Service Commission must be granted power to fix a rate retroactively if the decree is to stand, and

that this has not been proposed. This is a misconception of the meaning of the decree, which required no such powers in the commission. The power assumed in the decree was to impound over a limited period the difference between the statutory rate and what the plaintiff charged, and to distribute it later, accepting the rate eventually fixed as the proper measure of distribution for that period. The commission does not fix the rate, if by that is meant enforcing it in invitum. The Court merely accepts it as proper evidence over the period, in distributing the sums collected through the voluntary acceptance by the plaintiff of the benefit of the injunction. That acceptance has always operated in futuro. As showing how mistaken the assumption is, it may be observed that if the plaintiff had chosen to await the action of the defendants it would have been free to charge and keep whatever it wished, the statutory rate having in fact become invalid. It was, however, not content with that course, but demanded the extraordinary relief of an injunction to prevent the defendants from moving against it at all. In so doing it subjected itself to all equitable conditions upon that relief, from which it could and can still at any moment be free by vacating the decree. The sole question is whether it is an equitable condition to insist that the Court shall distribute the sums collected as nearly as it can in accordance with the long expressed policy of the State and with the eventual action of its officials. In pursuance of that purpose
99 it is not in the least essential that the commission should have power to fix a rate retroactively.

The first question is of an extension of the limit of one dollar and enty cents. When this was set, all the data were taken from the idence at the hearing, and the limit was based upon the utmost sum which it could be supposed that the plaintiff could be allowed to charge by the public service commission when it acted. At that me the plaintiff was apparently content with the limit, because on the reargument it challenged only what it mistakenly calls the "retroactive" feature of the decree. Since that time it has had over six months' experience with that limit, and it presents figures, which, if true, show that it cannot make a profit of three per cent. since its costs of manufacture and distribution have arisen to over one dollar and ty cents. With a possible profit of $.32 and income taxes of $.03, the rate comes to more than one dollar and forty-five cents. Indeed, its estimates, based upon the prices obtaining at the end of the period, are somewhat higher. Some of the items, as for example, the difference between gas produced and gas sold at ten per cent. are clearly too high, but the difference is not very substantial in result. The defendants, on the other hand, challenge the figures so profered, especially the cost of oil and coal, which account for most of the increase.

The issue, as I have already said, is misconceived. Of course, I annot at present undertake, especially on affidavits, to decide whether the plaintiff's claims are too high, nor would it be of service if I could. Nothing can be decided as to how much the plaintiff shall eventually retain, but only how much it shall presently
100 collect. In that I should have to be guided substantially by what the plaintiff claims so long as it makes a prima facie

case for its figures. The evidence is not sufficient to make any finding, and this is in any event not the time to do so. Moreover, it has proved impossible to avoid the consequence that the limit, if fixed, shall be supposed to be a rate, and it would be unfortunate to give any color to the supposition that a rate of one dollar and forty-five cents had the approval of a Court. Besides, the rights of the public are in any case protected if the plaintiff must eventually account for all sums collected. Finally, it must be conceded that since my decision there have been several rulings to the contrary and between us the Supreme Court alone can decide. If I set a limit and the Court eventually decides that I had no such power, the damages will be finally consummated, but if it holds that I have power to distribute the fund according to the rate, the money will be at hand, and nothing will be lost to consumers except the temporary use of their money on which they are being secured their interest. For all these reasons it appears to me, therefore, best not to extend the limitation beyond the original period.

I think, however, that the period should be extended over which the new rate when promulgated should relate back. I may assume that by May first, 1921, the Legislature will have finally determined what course to take, and whether it deems best to give power to the commission summarily to allow a temporary rate without an impounding feature. Hence, if there were no appeal pending I should think that in three months, that is, by August first, 1921, the
101 plaintiff ought not to be required any longer to deposit its collections in court. But it is scarcely possible to suppose that any commission would fix a new rate until the appeal from this decree is determined and therefore it appears to me that the impounding should continue for an adequate season after that, say three months. The sums impounded should, however, be held for a further time and until the commission has had a chance to come to more than a mere summary conclusion; they should therefore be held until the rate is finally settled by the commission and be then distributed in accordance with that rate, subject to qualifications I shall mention in a moment.

The plaintiff argues that that rate, which may not be fixed for many months after the commission begins its inquiry, will when fixed be no index of the proper rate during the period of accumulation. That of course may be true. The period may include a "peak" of prices, which would make inadequate a rate proper enough after the "peak" had passed. The answer for the present is that we cannot now tell what the future will show, and that even though there be such a "peak," it does not follow that the rate when fixed ought not to apply over the period. Willcox vs. Consolidated Gas Co., 212 U. S., 19, is a direct authority that for limited periods the rate need not insure a sufficient profit, and it would by no means follow that the rate as fixed should not be held applicable throughout the period despite a "peak." Prima facie I think it ought unless the plaintiff can show the contrary. Moreover, while the commission will presumably have no power to make a retroactive rate, it has large
102 powers of investigation and it may in fact be empowered to make findings as to the proper rate over the period in ques-

tion, even though it cannot prescribe for it. And even though the findings and rate were not rigidly applicable, it is nearly certain that some of the findings and principles on which the commission will proceed will be of extended application, which could in very substantial part be used by the Court in distributing the moneys. Such, for example might well be the rate of return, the valuation of the "rate-base," the propriety of the oil contract, the loss of gas, and many others. Nor, indeed, is it inconceivable that the commission or some properly delegated officer might consent to act as master of the Court if the distribution required an independent inquiry. As I conceive it, the Court is free by any means it can within the limits of equity procedure, to distribute the fund in the closest practicable conformity with the action of the State authorities when made. The Court has such latitude as may be necessary to accomplish that result. Some way should be found, I think, to prevent the plaintiff from enjoying a long period during which it may charge any rate it chooses. Certainly, that is contrary to the long standing policy of the State.

The defendants' motion I have therefore disposed of as follows: The motion to fix a limit to the plaintiff's charges after March one, 1921, is denied; the motion to extend the period for impounding is granted by extending that period until three months after the appeal is decided unless the commission before that period expires has put in force a new rate, temporary or final; the moneys so collected the master will distribute when the commission has finally fixed a rate and in accordance with that rate, unless the plaintiff successfully shows cause to the contrary. In that case it will be distributed as nearly as possible in conformity with the findings of the commission, and the principles on which the new rate has been fixed.

An Order in accordance with the foregoing is filed herewith.

February 28, 1921.

LEARNED HAND, *D. J.*

64 *Modifying Decree of February 28, 1921.*

United States District Court, Southern District of New York.

In Equity.

No. 15—358.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District, and EDWARD SWANN, as District Attorney of the County of New York, Defendants.

This cause came on to be further heard at the February term of this court, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the motion of the defendants to modify the sixth article of the decree of August fourth,
105 1920, as amended by the decree of August eleventh, 1920, be and the same hereby is denied. And it is

Further ordered, adjudged and decreed that the seventh article of said decree be amended so as to read as follows:

"(7) Further ordered, adjudged and decreed, as a further condition upon the continuance of said injunction, that until three months after the determination of any appeal taken from this decree, or until an earlier promulgation of some gas rate, temporary or final, by competent state authority, the plaintiff shall, on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York, all sums in excess of eighty cents. And it is

And it is

Further ordered, adjudged and decreed that the ninth article of said decree be and the same hereby is modified so as to read as follows:

"(9) Further ordered, adjudged and decreed that the said special master shall hold all moneys so collected by him until the promulgation by competent State authority, of a definitive or final rate, and shall on order thereupon distribute the same with accrued interest in accordance with such rate as though the same had been in effect from August 4, 1920. The plaintiff upon the application for such order may show cause why the said rate is not properly applicable
106 over the whole or any part of the said period, and, if the court so find, the said moneys shall be then distributed, as nearly as may equitably be done, in accordance with such rate, and especially with the principles and findings upon which it shall have been based. The special master shall retain his expenses and allowances out of said moneys when fixed by the court. And it is"

February 28, 1921. LEARNED HAND,
U. S. D. J.

107 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Complainant's Assignments of Error.

The complainant files the following assignments of error upon which it will rely upon its prosecution of its appeal in the above en-

titled cause from the supplemental order and decree made by this court on February 28, 1921.

1. The court erred in making that portion of said supplemental or amended final decree reading as follows:

"(7) Further ordered, adjudged and decreed, as a further condition upon the continuance of said injunction, that until three months after the determination of any appeal taken from this decree, or until an earlier promulgation of some gas rate, temporary or final, by competent state authority, the plaintiff shall, on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed Special Master for that purpose) out of all moneys collected by it for sale of gas in the City of New York, all sums in excess of eighty cents." And it is

108 2. The court erred in making that portion of said supplemental or amended final decree reading as follows:

"(9) Further ordered, adjudged and decreed, that the said Special Master shall hold all moneys so collected by him until the promulgation by competent State authority, of a definite or final rate, and shall on order thereupon distribute the same with accrued interest in accordance with such rate as though the same had been in effect from August 4, 1920. The plaintiff upon the application for such order may show cause why the said rate is not properly applicable over the whole or any part of the said period, and, if the court so find, the said moneys shall be then distributed, as nearly as may equitably be done, in accordance with such rate, and especially with the principles and findings upon which it shall have been based. The Special Master shall retain his expenses and allowances out of said moneys when fixed by the court."

SHEARMAN & STERLING,
Solicitors for Complainant,
55 Wall Street, New York City.

Endorsed: Copy received: Wilber W. Chambers. Dated Mar. 9, 1921. Copy Received: Terence Farley, 3/9/21. A copy of the within paper has been this day received at the office of the corporation counsel. Mar. 9, 1921. John P. O'Brien, Corporation Counsel. U. S. District Court, S. D. of N. Y. Filed Mar. 7, 1921.

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Petition for Appeal and Allowance Thereof.

To the Honorable Learned Hand, District Judge and one of the judges of the above named court:

The above named complainant, Consolidated Gas Company of New York, feeling aggrieved by the supplemental decree and order rendered and entered in the above entitled cause on February 28, 1921, wherein and whereby among other things, it was adjudged as follows:

"Further ordered, adjudged and decreed that the seventh Article of said decree be amended so as to read as follows:

"(7) Further ordered, adjudged and decreed, as a further condition upon the continuance of said injunction, that until three months after the determination of any appeal taken from this decree or until an earlier promulgation of some gas rate, temporary or final, by competent state authority, the plaintiff shall, on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed Special Master for that purpose) out of all moneys collected by it for sale of gas in the City of New York, all sums in excess of eighty cents. And it is

Further ordered, adjudged and decreed that the ninth Article of said decree be and the same hereby is modified so as to read as follows:

"(9) Further ordered, adjudged and decreed that the said Special Master shall hold all moneys so collected by him until the promulgation by competent State authority, of a definite or final rate, and shall on order thereupon distribute the same with accrued interest in accordance with such rate as though the same had been in effect from August 4, 1920. The plaintiff upon the application for such order may show cause why the said rate is not properly applicable over the whole or any part of the said period, and, if the court so find, the said moneys shall be then distributed, as nearly as may equitably be done in accordance with such rate, and especially with the principles and findings upon which it shall have been based. The Special Master shall retain his expenses and allowances out of said moneys when fixed by the court."

does hereby appeal from said supplemental order and decree to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith, and prays that this appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States under the rules of said court, in such cases made and provided.

111 And your petitioner further prays that the proper order relating to the security to be required of it be made.

New York, March 7, 1921.

SHEARMAN & STERLING,
Solicitors for Complainant,
55 Wall Street, New York City.

Appeal allowed upon giving bond as required by law for the sum of $500.

LEARNED HAND,
District Judge.

Endorsed: Copy received, Wilbur W. Chambers. Dated Mar. 9, 1921. Copy received, Terence Farley. 3/9/21. A copy of the within paper has been this day received at the Office of the Corporation Counsel, Mar. 9, 1921. John P. O'Brien, Corporation Counsel. U. S. District Court, S. D. of N. Y. Filed Mar. 7, 1921.

112 *Bond.*

National Surety Company.

Bond in the sum of $500 approved by Learned Hand, D. J., filed Mar. 7, 1921.

113 District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Citation.

United States of America, by the Honorable Learned Hand, One of the Judges of the District Court of the United States for the Southern District of New York, to Charles D. Newton, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York; Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the
114 & 115 City of Washington, District of Columbia, on the 7th day of April, A. D. 1921, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of New York from a supplemental or amended final decree signed, filed and entered on the 28th day of February, 1921, in that certain suit being in equity No. 15,358, wherein Consolidated Gas Company of New York, is plaintiff and you are defendants, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness The Honorable Learned Hand, United States District Judge for the Southern District of New York, this 7th day of March, 1921, and of the independence of the United States, the one hundred and forty-fifth.

LEARNED HAND,
U. S. District Judge for the Southern District of New York.

116 Endorsed | Index No. E 15-358. Year 192. District Court of the United States, Southern District of New York. Consolidated Gas Company of New York, Complainant, against Charles D. Newton, as Attorney General of the State of New York, et al., Defendants. Filed Mar. 12, 1921, U. S. District Court, S. D. of N. Y. Original Citation. Shearman & Sterling, attorneys for Complainant, 55 Wall Street, New York. Copy received. Willis W. Chambers. Dated Mar. 9, 1921. A copy of the within paper

has been this day received at the Office of the Corporation Counsel. Mar. 9, 1921. John P. O'Brien, Corporation Counsel. Copy received. Terence Farley, per C. A. 3/9/21.

116½ District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants-Respondents.

Præcipe.

To the clerk of the above named court:

You will please include in the transcript of the record on appeal of the complainant allowed March 7, 1921, the following papers:

1. This præcipe.

2. Defendants' notice of motion to modify decree dated February 15, 1921.

3. Complainant's affidavit filed in opposition to the defendants' motion for modification of the decree of August 11, 1920 including supplemental affidavit.

4. Affidavit of A. S. B. Little.

5. Affidavit of James A. Donnelly.

6. Reply affidavit of John Holley Clark, Jr.

7. Modifying decree filed February 28, 1921.

8. Opinion of Learned Hand, D. J. filed February 28, 1921.

9. Petition for appeal and allowance thereof.

10. Bond on appeal.

11. Complainant's assignments of error.

12. Citation.

Yours, etc.,

SHEARMAN & STERLING,
Attorneys for Complainant-Appellant,
55 Wall Street, New York City.

117 UNITED STATES OF AMERICA,
Southern District of New York, ss:

CONSOLIDATED GAS COMPANY OF N. Y., Appellant,

vs.

CHARLES D. NEWTON, as Attorney General, and Others, Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, pages 1 to 111 inclusive;

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this fifth day of April, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-fifth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 28,213. S. New York D. C. U. S. Term No. 856. Consolidated Gas Company of New York, appellant, vs. Charles D. Newton, as attorney general of the State of New York, et al. Filed April 7th, 1921. File No. 28,213.